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JSA
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V. 2.



R E P O R T S
OF
CASES
ARGUED AND DETERMINED
IN THE
HIGH COURT OF CHANCERY,
FROM THE
COMMENCEMENT OF MICHAELMAS TERM, 1815,
TO THE
END OF THE SITTINGS AFTER MICHAELMAS TERM, 1817.

By J. H. MERIVALE, Esq.
OF LINCOLN'S INN, BARRISTER AT LAW.

VOL. II.

1816—1817, 57 GEO. III.

LONDON:
PRINTED BY A. STRAHAN,
LAW-PRINTER TO THE KING'S MOST EXCELLENT MAJESTY;
FOR JOSEPH BUTTERWORTH AND SON, LAW-BOOKSELLERS,
43. FLEET-STREET;
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MICHAELMAS, 1816.—TRINITY, 1817.

LORD ELDON, *Lord High Chancellor.*

SIR WILLIAM GRANT, *Master of the Rolls.*

SIR THOMAS PLUMER, *Vice-Chancellor.*

SIR WILLIAM GARROW, }
SIR SAMUEL SHEPHERD, } *Attorneys-General.*

SIR SAMUEL SHEPHERD, }
SIR ROBERT GIFFORD, } *Solicitors-General.*

ADVERTISEMENT.

It is intended to comprise, in a third and concluding Volume of this Work, the remainder of the Cases determined by the *Lord Chancellor and Master of the Rolls*, from the time of its commencement to the end of the *Sittings* after Michaelmas Term, 1817; from which period, (the Reporter having found it impracticable to command the time and attendance which would be necessary to a further progress in his labours,) the Series commenced by *Sir George Cooper*, and carried on in the present publication, will be continued by *Mr. Swanston*.

TABLE

OF

CASES REPORTED

IN THIS VOLUME.

	Page	Page
A.		
Adams (<i>Ex parte</i>)	112	Burnett v. Chetwood 441, 442. n.
Addis v. Knight	117	Button, Bennett v. 400. n.
Angell v. Hadden	164	Byron (Lord) v. Johnson 29
Atkinson v. Hill	45	
Attorney-General v. Stewart	143	C.
B.		
Barr, Const v.	57	Cadogan, Montfort v. 3
Bennett v. Button	400. n.	Chambers v. Brailsford 25
Birch v. Haynes	444	Chetwood, Burnett v. 442. n.
Birley, Gladstone v.	401	Cholmondeley v. Clinton 71. 81.
Bradshaw v. Bradshaw	492	
Brailsford, Chambers v.	25	Christ Church (The Dean and Chapter of,) v. Simonds 467
Brewster v. Clarke	75	Christie v. Craig 137
Brook v. Skinner	481. n.	Clarke, Brewster v. 75
Brown, Sturges v.	511	Clinton, Cholmondeley v. 71. 81.
Brown v. Bruce	1	
Bruce, Brown v.	1	Cock, Lashbrook v. 70
Bruce v. Webb	474	Coker, Farewell v. 353
		Colchester (The Mayor, &c. of,) v. Lowten 118. 395
		a

TABLE OF CASES REPORTED.

	Page		Page
Const v. Barr	57	Haly v. Goodson	77
Cox v. King	483	Hannam v. The South Lon-	
Craig, Christie v.	137	don Waterworks Company	61
Crawter v. Speer	410	Harcourt, Liebman v.	513
Crutchley v. Jerningham	502	Harrison, King v.	475
Cutler v. Simons	103	Haynes, Birch v.	444
		Hill v. Atkinson	45
D.		Hobhouse, Jackson v.	483
Dalrymple, Woodhouselee		Hooker, Fildes v.	424
(Lord) v.	419	Howell, Tattersall v.	26
Duck, Widdowson v.	494	Hudson, Massey v.	130
Dyer v. Kearsley	482. n.	J.	
		Jackson v. Hobhouse.	483
E.		James, Newberry v.	447
Elwes, Forrest v.	68	Jerningham, Crutchley v.	502
		Johnson, Byron (Lord) v.	29
F.		Jones v. Powell	141
Fane v. Spencer	430. n.	Jones v. Tucker	533
Farewell v. Coker	353	K.	
Farnsworth v. Yeomans	142	Kearsley, Dyer v.	482. n.
Featherby, Terrewest v.	480	King v. Harrison	475
Fildes v. Hooker	424	King, Cox v.	483
Fish v. Klein	431	Klein, Fish v.	431
Forrest v. Elwes	68	Knight, Adams v.	117
		L.	
G.		Lambert v. Rogers	489
Garland, Smith v.	123	Langham v. Sandford	6
Gladstone v. Birley	401	Lashbrook v. Cock	70
Glanville v. Glanville	8	Leake v. Robinson	363
Goodson, Haly v.	77	Leathes, Mortlock v.	491
Green v. Green	86	Liebman v. Harcourt	513
H.		Lowten v. The Mayor of Col-	
Hadden, Angell v.	164	chester	113. 395

TABLE OF CASES REPORTED.

vii

		Page		Page
M.			Sherwood, Southey v.	435
Marsack, Morgan v.	107		Simonds, Christ Church (the	467
Massey v. Hudson	180		Dean and Chapter of) v.	467
Milbank v. Revett	405		Simons, Cutler v.	103
Montfort v. Cadogan	3		Skinner (<i>Ex parte</i>)	453
Morgan v. Shaw	138		Skinner, Nicholls v.	135. n.
Morgan v. Marsack	107		Skinner, Brook v.	481. n.
Mortlock v. Leethes	491		Smith v. Garland	123
Mortlock, Vipan v.	476		South London Waterworks	
			Company, Hannam v.	61
			Southey v. Sherwood	435
			Speer v. Crawter	410
N.			Spencer, Fane v.	430. n.
Nedriff, Rickcord v.	458		Stead v. Newdigate	521
Newberry v. James	447		Stewart, The Attorney-Gener	
Newdigate, Stead v.	521		ral v.	143
Nicholls v. Skinner	135. n.		Strickland, Wood v.	461
			Sturges v. Brown	511
			Sullivan v. Sullivan	40
			Sumner v. Powell	30
Q.				
Ord, Tempest v.	55		T.	
Owen v. Owen	44. n.			
			Tattersall v. Howell	26
			Tempest v. Ord	55
P.			Terrewest v. Featherby	480
Partridge (<i>Ex parte</i>)	500		Tibbits v. Tibbits	95. n.
Pincke (<i>Ex parte</i>)	452		Tucker, Jones v.	533
Powell, Jones v.	141			
Powell, Sumner v.	30		V.	
			Vipan v. Mortlock	476
R.				
Raynes v. Wyse	472		W.	
Revett, Milbank v.	405			
Rickcord v. Nedriff	458		Warner, White v.	459
Rodgers, Lambert v.	489		Webb, Bruce v.	474
			Wetherherd, Wilson v.	406
			White v. Warner	459
			Whitbread (<i>Ex parte</i>)	99
S.			Widdowson v. Duck	494
Sandford, Langham v.	6		Wilson v. Wetherherd	406
Shaw, Morgan v.	138		Wood v. Strickland	461

TABLE OF CASES REPORTED.

	Page	Y.	Page
Woodhouselee (Lord) v. Dal-			
rymple	419		
Wyse, Raynes v.	472	Yeomans, Farnsworth v.	142

TABLE

OF

CASES CITED

IN THIS VOLUME.

A.			Page
Adam, Wilkinson v.	392.	422	
Aickle's case		465	
Aiery, Ellison v.		383	
Andrews v. Emmott		536	
Andrews v. Partington		383	
Attorney General v. Lady			
Louisa Manners		53	
Audley, Jee v.		390	
Avis, Roe v.		393	
B.			
Batsford v. Kebble		385	
Beechcroft v. Beechcroft		422	
Birley v. Gladstone		401	
Blandford v. Thackerell		392	
Blower v. Morritt		115	
Bolton (Duke of) v. Williams		169	
Bolton, Deverell v.		429	
Booth v. Booth		386	
Boreman, Seymour v.		347	
Braybroke (Lord) v. Inskip			355
Bromley v. Holland			167
C.			
Campbell v. Hall			158
Cartwright v. Vawdry			422
Chambers v. Goldwin			69
Chiswell, Stephenson v.			121
Church v. Mundy			393
Clennell v. Leathwaite			20
Cloyne (Bishop of) v. Young			23
Conyers, Wake v.			417
Croft, Green v.			53
D.			
Da Costa v. Da Costa			43
Darlington, Pulteney v.			93
Davis, Godfrey v.			422
Devaynes v. Noble			36

TABLE OF CASES CITED.

	Page	I and J.	Page
Deverell v. Bolton	429		
Doe v. Pugh	348	Inskip, Braybroke (Lord) v.	355
Dorrill, Routlege v.	391	Jee v. Audley	390
Douglas v. Paxton	480	Jenour v. Jenour	116
		Johnson v. Peck	115
E.			
		K.	
Ellison v. Aiery	383	Kebble, Batsford v.	385
Emmott, Andrews v.	536	Kemp v. Mackarel	115
		Kennerley, Swaine v.	422
		The King v. Vaughan	156. n.
F.			
		L.	
Farr v. Newman	481	Lawley v. Lawley	360
Finch, Nourse v.	23	Lewthwaite, Clennell v.	20
Fletcher (<i>Ex parte</i>)	452	Lloyd v. Maund	501
Foljambe, White v.	429		
Foster v. Munt	16		
Foster, Hyde v.	459. n.		
G.			
		M.	
Gladstone, Birley v.	401	Mackarel, Kemp v.	115
Godfrey v. Davis	422	Manners (Lady Louisa,) At-	
Goldwin, Chambers v.	69	torney-General v.	53
Green v. Croft	53	Maund, Lloyd v.	501
		May v. Wood	385
		Mocher v. Reed	407
		Morgan v. Scudamore	115
		Morritt, Blower v.	115
		Mundy, Church v.	393
		Munt, Foster v.	16
H.			
		N.	
Hall v. Smith	115	Nannock v. Horton	587
Hall, How v.	465	Newman, Farr v.	481
Hall, Campbell v.	158	Nicholls v. Skinner	135
Hanson (<i>Ex parte</i>)	121	Noble, Devaynes v.	36
Harmood v. Oglander	368	Nourse v. Finch	23
Harris v. Stewart	422		
Hayward, White v.	114		
Holland, Bromley v.	167		
Hopkins v. Hopkins	358		
Horton, Nannock v.	537		
How v. Hall	465		
Hulme v. Tenant	487		
Hunter, Pulsford v.	386		
Hyde v. Foster	459. n.	O.	
		Oglander, Harmood v.	360

TABLE OF CASES CITED.

xi

P.	Page	T.	Page
Parkes v. White	487	Tenant, Hulme v.	487
Partington, Andrews v.	383	Thackerell, Blandford v.	392
Paxton, Douglas v.	480	Thellusson v. Woodford	95
Peck, Johnson v.	115	Thorne v. Pitt	115
Pickering v. Lord Stamford	394	Towgood (<i>Ex parte</i>)	122
Pitt, Thorne v.	115		
Prendergast v. Saubergue	512		
Pugh, Doe v.	348	U.	
Pulsford v. Hunter	386		
Pulteney v. Darlington	93	Uxbridge (<i>Ex parte</i>)	501
Pulvertoft v. Pulvertoft	127		
Pybus v. Smith	487		
		V.	
Q.		Vaughan, The King v.	156. n.
Quintin (<i>Ex parte</i>)	122	Vawdry, Cartwright v.	422
		W.	
R.		Wake v. Conyers	417
Reed, Mocher v.	407	Walcot v. Walker	429
Roe v. Avis	393	Walker, Walcot v.	429
Routlege v. Dorrill	391	Welby v. Welby	393
		Wheeler (<i>Ex parte</i>)	501
		White v. Foljambe	429
S.		White, Parkes v.	487
Saubergue, Prendergast v.	512	White v. Hayward	114
Scudamore, Morgan v.	115	Wilkinson v. Adam	392. 422
Seymour v. Boreman	347	Williams, Bolton (Duke of) v.	169
Skinner, Nicholls v.	135	Williams (<i>Ex parte</i>)	501
Smith, Hall v.	115	Wood, May v.	385
Smith, Pybus v.	487	Woodford, Thellusson v.	95
Socket v. Wray	488		
St. Luke's v. St. Leonard's	417	Y.	
Stamford, (Lord) Pickering v.	394		
Stephens (<i>Ex parte</i>)	121	Young, Cloyne (Bishop of) v.	23
Stephenson v. Chiswell	121		
Stewart, Harris v.	422		
Swaine v. Kennerley	422		



PROMOTIONS,

In and after Hilary Term, 1817.

On the death of CHIEF BARON THOMPSON, SIR RICHARD RICHARDS, Knight, one of the Barons, was appointed Chief Baron of the Court of Exchequer.

SIR WILLIAM GARROW, Knight, His Majesty's Attorney-General, was appointed a Baron of the Exchequer.

SIR SAMUEL SHEPHERD, Solicitor-General, was appointed Attorney-General to His Majesty. And

ROBERT GIFFORD, Esquire, of Counsel to His Majesty, and afterwards Solicitor-General, and received the honour of knighthood.

JOHN LEACH, Esquire, Chancellor of the Duchy of Cornwall, was appointed Chief Justice of Chester, in the room of Mr. BARON GARROW.

In the vacation after Trinity Term, on the death of ROBERT STEELE, Esquire, WILLIAM COURTENAY, Esquire, was appointed a Master in Chancery.



REPORTS

OF

CASES

ARGUED & DETERMINED

IN THE

HIGH COURT OF CHANCERY,

Commencing in the Sittings before

MICHAELMAS TERM,

57 Geo. 3. 1816.



BROWN v. BRUCE.

1816.



Nov. 1. 9.

ON a Motion for an Attachment, the Defendant stated that he had offered to put in an Answer, which was refused at the Six Clerks' Office for want of Counsel's signature; and he contended, that the signature of Counsel was unnecessary, there being no Order of the Court requiring it.

The signature of counsel is necessary to an answer.

The constant and undisturbed practice of the Court is binding, as the law of the Court, without positive order. The old practice on country commissions

The LORD CHANCELLOR directed a search to be made; at the same time intimating that, even though it should turn out, as the Defendant alleged, that there was no Order to that effect in existence, yet the constant admitted practice of the Court was as little to be disturbed as if

equivalent to a signature by counsel.

1816.

BROWN
v.
BRUCE.

founded on positive order; and added, that the question was not merely as to a point of form, but that in many cases further security was necessary than that of the Defendant himself, in order to guard the adverse party against, and to keep the records of the Court clear from, scandal or impertinence.

Nov. 9.

Search having been made accordingly, and no order found, the motion was renewed on the part of the Plaintiff.

The LORD CHANCELLOR.

Ancient and uniform practice constitutes the law of the Court as much as a positive order. In this instance, the old practice afforded the same security which is now required to be given by the counsel's signature. For when a Commission was sent into the country, the course was to send with it a copy of the Bill; and the Commissioners, who were always Barristers, being furnished with this muniment, interrogated as to the facts alleged by the bill, so that the answer of the Defendant had, in substance, that which was equivalent to the signature.

Unless the Defendant, in this case, can make out by positive affidavit, that he has been prevented from obtaining the signature of Counsel by his attorney refusing to submit his case for that purpose, (this being an allegation also made by the Defendant at the bar, but unsupported by evidence,) the Attachment must issue.

Afterwards, on the 19th of November, an Attachment issued accordingly. (a)

1816.

Appeal from
the ROLLS.

Nov. 8. 11.

LORD MONTFORT v. LORD CADOGAN.

BY the Decree made at the Rolls, 9th of July, 1810 (a), it was declared that the then late Defendant Earl *Cadogan*, and the Defendant Sir *T. C. Bunbury* (the trustees named in the marriage-settlement of Lord and Lady *Montfort*), ought to have renewed the lease granted by the Dean and Chapter of Westminster, at the times when the same became renewable, and to have paid the fines, fees, and expences attending the same, by and out of the annual rents and profits of the premises thereby demised; and that, not having so renewed the same, they had been guilty of a breach of trust; — that £3092. 17s. 6d., which had been paid by the Plaintiff for the renewal, ought to be paid him by the representatives of Earl *Cadogan* (deceased), and by the said Sir *T. C. Bunbury*, but that the same ought to be repaid to them by and out of the personal estates of Lord *Montfort* deceased, and of the Dowager Lady *Montfort*, according to the times they had

Settlement of a renewable lease in trust out of the rents and profits to pay the charges of renewal, and subject thereto for husband and wife successively for life, remainder to the first son at 21. The Trustees, having neglected to renew, are answerable as for a breach of trust, and liable to pay to the son the

amount of what he had laid out in procuring a renewal; to be repaid to them out of the estates of the tenants for life, with reference, not to the duration of their respective possessions, but to the proportions in which they would actually have suffered a diminution of rent in case the rents had been properly applied towards the renewals.

The assignee of one of the tenants for life, with notice of the settlement, neither primarily liable, nor to be called upon by the trustees to contribute towards their repayment; but only, in case of all the other estates proving insufficient, to make good to the son the deficiency.

(a) 17 Ves. 485.

1815.


MONTFORT
 v.
CADOGAN.

respectively been in possession of the premises, or in receipt of the rents and profits thereof. And it was ordered accordingly.

From this Decree, Earl *Cadogan's* representatives and Sir *T. C. Bunbury* appealed, upon the grounds that a Decree ought not to have been made against them, either personally to pay the said sum or to charge them as wilful defaulters in not having the lease renewed — that in case they ought to have been at all charged, it should have only been in aid of any deficiency of payment by the estates of Lord *Montfort* deceased, and of Lord *Howe*, and of the Dowager Lady *Montfort* — that Lord *Howe* ought to have been ordered, in respect of his purchase from Lord *Montfort*, to contribute his proportion towards payment of the money required for the renewal — and that the contributions to be paid by the respective parties interested ought to be settled and ascertained under the Decree of the Court, and after a reference to the Master.

Hart and *Heald*, for the Appellants.

Sir *S. Romilly* and *Daniell*, for the Plaintiff.


Leach and *Trower*, for Lady *Montfort* and Lord *Howe*.

The LORD CHANCELLOR.

After observing at great length on the peculiar trusts of the settlement, affirmed all that part of the Decree which declares the Trustees to have been primarily liable to make good to the Plaintiff the full amount of the expences incurred by him in the renewal of the lease; but said, he was disposed to vary so much of the subsequent part of the Decree

as went to declare the proportions of the fine with which the respective estates of Lord and Lady *Montfort* were chargeable, with reference to the time during which each had successively been in the enjoyment of the property. In this case, Lord *Montfort* had been in that enjoyment from the date of the settlement (*January, 1772*) to the end of 1799 (when he died,) and Lady *Montfort*, only from the period of his death to 1808. The lease ought to have been renewed twice during the period of their successive enjoyment — once in 1786, and again in 1800. Consequently, if the Trustees had done their duty, Lady *Montfort* would, on coming into possession, in 1800, have had a lease for forty years, (commencing in 1786,) together with a sufficient fund in hand to have paid for the renewal in that year. To that extent, therefore, Lord *Montfort's* estate was chargeable, and Lady *Montfort* only to such amount as it would be necessary to reserve out of the rents and profits from 1800 towards the fine for the next renewal, during her own exclusive enjoyment of eight years only. With regard to Lord *Howe*, he was of opinion, that the Trustees could have no recourse upon him. The Plaintiff only could have relief by applying, in case the estates of the Trustees should prove insufficient.

The Decree was affirmed accordingly, with such variations as above mentioned.

1816.

 MONTFORT
 v.
 CADOGAN.

1816.

Appeal from
the ROLLS.

Nov. 11, 12, 14.

Dame JULIANA LANGHAM, Widow, and Others,
(some of the next of kin of the Testator, Sir JOHN
CHICHESTER, deceased) - PLAINTIFFS;

AND

JOHN SANDFORD, Clerk, Executor of the said
Testator, and the rest of the next of kin of the said
Testator, - - - - - DEFENDANTS.

Testator gives
to A. £10,000,
together with
the furniture in
his houses,
(plate only ex-
cepted,) and ap-
points him
executor.

Although the
gift of the le-
gacy amounts
to a violent pre-
sumption in law

THIS Cause came before the Court upon Appeal
by the Defendant, the executor, from the Decree
pronounced by His Honour the *Master of the Rolls*,
March 15, 1811, whereby it was declared, "that the
" Defendant was a trustee of the residue of the Tes-
" tator's personal estate, for the benefit of the next of
" kin, according to the statutes of distribution of the
" personal estates of persons dying intestate;" and
it was referred to the Master to take the usual ac-
counts accordingly. (a)

Leach and Wingfield, for the Plaintiffs.

that the Testator meant to exclude him from the beneficial interest
in the residue, the exception out of the bequest of furniture is not a
circumstance to confirm that presumption, so as to preclude him from
giving parol evidence of intention in his favour; such evidence being
also liable to be repelled by evidence of a contrary intention.

The evidence not amounting to a direct intention in the executor's
favour, and being met by contrary evidence tending to confirm the
legal presumption against him, he was declared by the Master of the
Rolls to be a trustee of the residue for the next of kin, and the decree
at the Rolls was now, upon appeal, affirmed.

N. B. In this case, it was contended, that to rebut the presumption
of law, it is enough to show evidence of an intention to exclude the
next of kin, without any evidence of direct intention in favour of the
executor; but the Lord Chancellor's judgement seems to have left
that point undecided.

(a) See the report of the Case, 17 Ves. 435.

CASES IN CHANCERY.

7

Hart and Bell, for the Defendants in the same interest with the Plaintiffs.

1816.

LANGHAM

v.

SANFORD.

First, as to the admissibility of the evidence (a). The rule is, that if it appears upon the face of the Will, either by plain declaration or necessary implication, to have been the intention of the Testator to exclude his executor from the beneficial interest in the residue, parol evidence shall not be admitted to contradict this apparent intention. Thus it has been decided, that such necessary implication is afforded by the circumstance of a legacy being given to the executor expressly for his care and trouble. It is manifest from this, that the Testator considered he was imposing a burden; and it follows, by necessary implication, that he did not mean to give his estate. The objection to the admissibility of the evidence in the present case, is founded on the gift to the executor of the sum of £10,000, together with the furniture in two houses, "plate only excepted." And the argument for the next of kin, is, that the plate, being excepted from this legacy, and not afterwards disposed of, falls into and becomes part of the residue, and therefore that the Testator, having said that his executor shall not take the plate, must be held to have said that he shall not take the residue, of which the plate forms a part; since, otherwise, he would have contradicted himself.

This argument was not held conclusive by the *Master of the Rolls*, who answers it by observing, that "according to the strict letter, the Testator does not say, the executor is not to have the plate; but merely, that he is not to have the plate as part of the furniture." (b).

(a) See the arguments upon this point at the Rolls, 17 Ves. 441.

1816.

LANGHAM

v.

SANFORD.

That is, the Testator has merely said, his executor shall not take the plate as part of the furniture, leaving it unpredicated whether he is to take it in any other character or not. But all the rules for construing wills are founded on the principle of excluding conjecture; and, however rational a conjecture may be formed as to what might have been a Testator's intention although not expressed, a Court is not to guide itself by such conjecture. It is enough that in this case the Testator has excepted the plate out of his general gift of furniture. If we do not find that the excepted plate is afterwards given, it is in vain to say, the Testator probably meant to give it. On the contrary, we must in the absence of any positive expression of such intention, conclude that he meant to leave it, as we find it according to the strict letter of the will, undisposed of. And then the objection will hold good.

But the evidence on both sides being admitted (a), that which has been furnished against the claim of the executor, greatly outweighs the contrary evidence in his favour. In reading the evidence, it must be remembered, that, if the Testator appears to have had no settled intention at the time of making his will that his executor should take the residue, it is utterly immaterial whether he had or had not such intention at any subsequent period. The evidence of what passed at the time of making his will, is therefore very material. (b) The single question is, whether the Testator at that time intended to give the residue to his executor, not whether he then or at any other time intended that his next of kin should not have it; now

(a) According to the rule laid down in *The Bishop of Cloyne v. Young*. 2 Ves. 91. See Belt's Supplement, 285.

(b) The material points in the evidence are stated and commented upon in Mr. Vesey's Report of the case, *ut sup.*

the evidence on the part of the executor amounts simply to this, that the Testator intended his next of kin should not take. It does not amount to a proof that he intended any other person should take. And, after all, comes the gift of the leasehold-house in the codicil, which, supposing the Testator had meant that Mr. *Sanford* should take the residue, would have been wholly unnecessary. Or, if it shall be said that the Testator might nevertheless have chosen to give the house as a specific legacy, then it is met by the rule in *Southcot v. Watson (a)*, deciding that a specific legacy excludes from the residue equally with a pecuniary legacy.

1816.

 LANGHAM
 v.
 SANFORD.

Sir *S. Romilly*, *Courtenay*, and *Roberts*, for the Appellant.

It is too late to contend against all the decided cases, that this evidence is not admissible. The Testator, by excepting the plate, may have meant only to except it as a specific legacy; and this is enough to prevent such a manifest contradiction, as alone would exclude the evidence.

Then as to the effect of the Evidence. The Testator had it in contemplation to appoint Mr. *Scott* an executor jointly with Mr. *Sanford*, and communicated that intention to Mr. *Scott*, who declined the office. Now, if the Testator's intention in that respect had been effected, the consequence must have been that the two executors would have taken the residue between them; because the gift of a legacy to one of two executors, or of unequal legacies to both, does not exclude either. Then, having expressed that intention, it is the same thing as if he had expressed a direct intention to give the residue to him

(a) 3 Atk. 226.

1816.

LANGHAM

v.

SANFORD.

whom, in the end, he constituted his sole executor. It cannot be known what proportion the £500 afterwards given to Mr. *Scott* bears to the share of the residue to which he would have been entitled in case the appointment of the two had taken place, because the Court will not go into evidence as to the *quantum* of the estate; but the circumstance of a legacy being given to him subsequently to his refusal of the office, plainly shows that the Testator imagined he was conferring a beneficial interest by appointing him to the office, for the loss of which he intended to make amends by giving him the legacy.

It is enough for the purpose of entitling the executor to take, that it is shewn to have been the Testator's intention that his next of kin should not take. *Bachelor v. Searle* (a), is an extremely strong case to that effect, because there the mere evidence of intention to exclude the next of kin was held sufficient to entitle the executor, even against a contrary inference of intention to die intestate as to the residue. The same principle was acted upon in *Bracebridge v. Woodroffe* (b), and *Clennell v. Lewthwaite*. (c) The intention is presumed to be in favour of the next of kin, unless rebutted by evidence; but what evidence can be stronger to rebut that intention, than the proof of a contrary intention, that the next of kin should not take? It follows that when that contrary intention is proved, the executor must be let in as if there had been no legacy to exclude him.

(a) 2 Vern. 737.

(b) 2 Atk. 68.

(c) 2 Ves. jun. 473. where the Master of the Rolls (*Arden*), observing upon the case of *Bracebridge v. Woodroffe* says, "I quote it for this,

that, though they have legacies, yet if it appears by evidence that the Testatrix always declared the next of kin should have nothing, that is sufficient."

The rule itself, that the gift of a legacy does exclude an executor, is established on the mere ground of its being evidence of intention; but it is only one species of evidence, and as such liable to be outweighed by evidence of a contrary tendency. And the reason of its being received as such evidence is not as is commonly imagined, that the Testator cannot mean to give to the same person all and some, the whole, and a part of that whole, by the same instrument; for that reason will not apply—the Testator would not, by so doing, give all and some; he would give two things, which are essentially different in their properties. The true reason is, that a legacy to an executor must be presumed to be given as a recompence for his care and trouble, even where it is not so expressed. It is, therefore, in all cases, of great importance to ascertain whether the legacy is given to the executor *as* executor; and accordingly in some late cases considerable stress has been laid upon this distinction. *Griffith v. Hamilton.* (a) *Dawson v. Clarke.* (b) Here the Testator does not name the defendant executor, until *after* he has given him the legacy.

1816.

 LANGHAM
 v.
 SANFORD.

The LORD CHANCELLOR.

He has given him the legacy by the same instrument under which he is appointed executor; and no part of a will has any effect previous to its signature by the Testator.

Leach, in reply.

The established rule in cases of this nature is favourable to the intention of the Testator in almost every instance. The principle upon which the rule

(a) 12 Ves. 298.

(b) 15 Ves. 409 affirmed on appeal, 18 Ves. 247.

1816.

LANGHAM

v.

SANFORD.

was founded, is not what it has been represented to be ; but it is this, that if the Testator had meant his executor should take all that he did not give to others, he would not have given him a part of that whole, which would be perfectly nugatory. True, it is said in answer to this, that the Testator might be uncertain as to the amount of the residue, or whether there would be any residue, and therefore gives his executor a legacy, in order to secure him something in all events. But, to a vast majority of cases, this reasoning does not apply. Besides, the rule is not that a legacy given absolutely excludes from the residue ; it only establishes it as *prima facie* evidence of an intention to exclude, admitting evidence *aliunde* to rebut the presumption which arises from it. But if the will itself contains not only the gift of a legacy, but additional circumstances amounting to what is called "declaration plain," or necessary implication, of the same intention ; in such cases, no other evidence can be admitted, upon the general rule of policy which refuses the admission of evidence to contradict a written instrument.

To apply these principles to the present case — We are not at liberty to construe the sense of any particular expression in a will by mere conjecture, so as to do away the effect of its obvious meaning. This Testator gives to his executor £10,000 together with a house and furniture, "plate only excepted." The plate remains undisposed of ; and the next of kin of the Testator say, this is a plain declaration that the executor shall not take that which is undisposed of ; because, if he were to take that which is undisposed of he would take the plate as being undisposed of, and the Testator has expressly declared, by virtue of the exception out of his specific bequest of the furniture, that he shall not take the plate at all. The

distinction made by the master of the Rolls is this,—the Testator gives the furniture as a specific bequest; he does not intend that the gift of the plate shall be accompanied with the same advantages; and therefore he has excepted it, not that he intends his executor shall not have it, but that he shall have it only as part of the residue; that is, after payment of all other legacies both specific and pecuniary. But the objection to this argument is, that it goes too far, and is equally applicable to the rule itself, which is now so established as to be the law of this Court; because it may be said, how can the Testator be held to have excluded his executor from the residue by giving him that which is of a different kind and quality? Nevertheless, the Court has adopted the rule, and, by adopting it, has in principle denied the force of the argument—It has said, that is not the right mode of construing a Testator's intention.

1816.

 LANGHAM
 v.
 SANFORD.

The case, however, does not depend upon this preliminary point; and the true question is, whether the Testator meant that Mr. *Sanford* should, by virtue of his appointment as executor, take the residuary estate. It is a singular proposition that, because a Testator did not intend a certain class of persons to take, therefore he did intend that a different person or class of persons should take; and, however such an argument may appear to be borne out by some loose *dicta* in its favour, the current of all the authorities is decidedly against it. In *Bachelor v. Searle (a)*, the Testator had declared that “he would give no more away”—Away, from whom? From his executors. That was incapable of any other construction. In *Bracebridge v. Woodroffe (b)*, the ground of the decree was the inequality of the legacies; the inference from

(a) 2 Vern. 77.

(b) 2 Atk. 68.

1818.

LANGHAM

v.

SANDFORD.

which was only assisted by the evidence of intention to exclude the next of kin. Lord *Alvanley's* judgment in *Clennell v. Lewthwaite* (a), when taken altogether, goes to establish a conclusion directly contrary to that which the Appellant contends for. So, in the present case, the evidence by no means amounts to what is attempted to be inferred from it. To suppose in the testator a knowledge of the rules of law in one instance, necessarily implies an equal degree of knowledge in others; and thus the argument from his intention to appoint *Scott* a co-executor defeats itself.

The LORD CHANCELLOR.

Although it is probable that this question may still be brought before another tribunal, I should not satisfy myself in deciding it without first anxiously looking into all the papers that have been produced. At the same time, I am so familiar with the cases containing the doctrine of the Court on this subject, having frequently travelled through them, that I shall not think it necessary to delay giving my judgment. With respect to the wisdom of the established rule, I shall say nothing about it. It is the law of this Court, and as such, I am bound to believe it to be a wiser general rule than any which I should be able to substitute in the room of it. At the same time I may say that, if the rule had been absolutely imperative and inflexible, either excluding the executor or the contrary, I cannot see that there would have been any great inconvenience in that; but what presses on the mind of the Judge who is to decide each particular case, is the great variety of instances in which the rule has been made to bend to circumstances. With regard to the admissibility of the evidence, I am of opinion, that

it is clearly admissible on legal grounds. I therefore think myself at liberty to look into and examine it; and I should not do justice between the parties if I were not to examine it thoroughly.

1816.

 LANGHAM
 v.
 SANFORD.

The LORD CHANCELLOR.

Nov. 14.

This case comes before the Court on Appeal from a Decree made by the Master of the Rolls, who was of opinion that *Mr. John Sanford* (who was appointed executor of *Sir John Chichester*, by a testamentary paper, dated the 28th of *May*, 1808,) is to be considered as a trustee for the next of kin in respect of the residue.

It may be useful, in the first instance, to state the effect of the several papers which constitute the will itself, in distinction from those which the Testator appears to have intended as testamentary, but which never were executed.

[*The* LORD CHANCELLOR then proceeded to read the several instruments, the first of which was the paper of the 28th of *May*, to the effect stated in the report of this case (*a*), and which was attested by *Abraham Scott*, the person appearing by the evidence to have been intended by the testator as one of his executors. By the second writing, dated the 29th of *May*, £500 was given to the same *Abraham Scott*, as a legacy; and by a third, dated the 31st of *May*, another legacy of £500 was given to the same *Abraham Scott*, besides several legacies to other persons, almost all of whom were of the next of kin to the testator. The next paper, also dated the 31st of *May*, (but which was not witnessed,) was to the effect

1816.

LANGHAM

v.

SANDFORD.

stated in the report ; as also was the last of these testamentary papers (a), dated the third of *September*.]

The question upon all these instruments taken together is whether Mr. *Sanford* is entitled to hold to his own use the personal estate not disposed of, (the amount of which, though not stated, cannot affect the question), or, whether (according to the now established law of this Court) the testator is to be understood as having meant that Mr. *Sanford* should take the office of executor, without meaning, *at the time of making his will*, (and upon this I lay great stress,) that he should have the beneficial interest in the undisposed residue.

It is undoubtedly, at the present moment, too late to consider how a question of this sort should be settled, supposing it to be *Res integra*. For, taking all the cases together, (which it is unnecessary to state at length, as they are collected in *Clennell v. Lewthwaite* (b), and *Nourse v. Finch* (c), from *Foster v. Munt* (d) downwards, (supposing *Foster v. Munt* to be the first of those cases which, however, I very much doubt,) the law appears to be fixed ; inasmuch that, although an individual asking himself the question whether a legacy given to an executor generally, or whether a specific legacy given to him, necessarily raises an inference that he is not meant to take the residue beneficially, might (supposing he could apply to it a mind unaffected by precedent) confidently assert that there is no such necessity ; yet, when it has been over and over again asserted, that the gift of such legacies is inconsistent with the

(a) The same which formed the subject of the question in *Sanford v. Raikes*, ante, vol. i. p. 646.

(b) 2 Ves. i. 465.

(c) 1 Ves. i. 344.

(d) 1 Vern: 473.

gift of the residue, I think it must be taken as now settled, that where a pecuniary or specific legacy is given to an executor, it raises what is called a strong and violent presumption that the executor is not to take the residue;—in other words, that the Testator did not intend he should take the residue. On the other hand, although this is a strong and violent presumption, it is still but a presumption, capable of being rebutted in equity by parol evidence; and, if that evidence raises a strong and violent case on the other side in support of the proposition that the Testator did intend that he should take the residue beneficially, the first presumption gives way, and the executor takes the benefit both of the legacy and of the residue. But I conceive, as the law is now settled, that, if there is no more in the case than a dry appointment of a person to be executor, to whom a legacy has been given, there is that strong, violent, legal presumption, which calls upon the Court to say, he is a trustee of the residue.

1816.

 LANGHAM
 v.
 SANFORD.

Then, with regard to the admissibility of evidence, it has been truly stated, that parol evidence is not admissible, in cases where it is conclusively apparent on the will itself, that the executor was meant to be a trustee only; and I take the converse of the proposition to be equally true, viz. that if on the face of the will there is no intention apparent, that the executor should take the residue beneficially, parol evidence will not be admitted to show that it was meant he should not take the residue beneficially.

If, on the face of the will, there is not an intention apparent to exclude the executor, parol evidence of such intention is not admissible.

It has been argued, however, (and this is the first point which my duty calls me to observe upon,) that this preliminary question must be decided against the executor, because it is clear on the face of the will itself that he was meant to be a trustee, and if so, upon the

1816.

LANGHAM

v.

SANFORD.

principle above laid down, parol evidence cannot be admitted to rebut that clear positive intention: and this proposition is made to rest upon two grounds; the first of which is, the terms in which the legacy is given to the executor by the first testamentary paper, of the Testator's furniture in his two houses, "plate only excepted." As to this, it is said that, supposing the Testator had meant he should take the residue, the plate (being excepted) must fall into the residue; and thus the executor would take that which, the Testator has expressly said, he shall not take. In other words, the Testator has said he shall not take the plate; but the plate is a part of the residue; therefore the Testator has said he shall not take the residue.

Now to this objection more than one answer has been given by the *Master of the Rolls* who, after reserving to himself time for the consideration of the case, stated his opinion to be that there was no weight in it, observing — and I entirely concur with him in the observation — that the Testator, in giving his furniture, "plate excepted," has done no more than he would have done had he specified every article of furniture which he meant to give, and said nothing about plate; as in the case of an ordinary specific bequest, which, when there is no more in the will, does not shut out the executor from the benefit of evidence to rebut the presumption against him. (a) There is sound sense in that. Then there is another observation, which probably His Honour was led to in consequence of the effect of the evidence which he had been looking forward to in the case; for he says, "a supposable case is, that the Testator had, at that moment, an intention that the executor should not take it, meaning to dispose of it to some other person, but not carrying that intention into

execution. (a)" But the reply to that is, that you must confine your observations to the will itself. You cannot travel out of the will to let in the effect of evidence, when the very question you are considering is, whether evidence shall be let in at all.

1816.
LANGHAM
v.
SANFORD.

There is still another answer to the objection. The plate is excepted out of a specific bequest; therefore, if the executor is to take it, he takes it in a different quality from that in which he would have taken it if it had not been so excepted. For that which is specifically bequeathed, is not liable to the payment of pecuniary legacies in case of a deficiency of assets; whereas the plate, taken as a part of the residue, excepted out of the specific bequest of the furniture, would be so liable. (b) This argument the counsel for the Plaintiffs have ably endeavoured to repeal; and they say, the rule of law being that a specific bequest to the executor shuts him out from the residue, that is an observation which would equally apply to the rule of law itself as to the particular case before us. But then, the first answer to the objection constitutes a sufficient reply to that also. The gift of a specific legacy to an executor does not exclude evidence in his favour; and the gift of furniture with the exception amounts to no more than a specific bequest of every article of furniture, leaving out that which is the subject of the exception.

The other ground of objection to the admissibility of evidence arises out of the codicil giving to the executor the house in *Seymour place*, which he had contracted to purchase, to be paid for out of timber ordered to be cut down (c); and it is said, this indicates the

(a) 17 Ves. 443. on the objection. 17 Ves. 443.

(b) This is the substance of (c) 17 Ves. 437 Ante, vol. His Honour's first observation i. 646.

1816.

LANGHAM

v.

SANFORD.

Testator's own knowledge that he had not given his executor the surplus; but to this it is a sufficient answer, that he might have meant no more than to give to his executor the means of completing the contract out of a fund which, not forming a part of the personalty, would not otherwise have been applicable to that purpose.

If, then, the question in this case were to depend on the will alone, it seems to me, upon all the authorities, that the executor would be excluded from taking the surplus of the estate for his own benefit. But he is not so absolutely excluded as to refuse the admission of evidence that the Testator intended the contrary; and I may safely apply to this case the words which Lord *Alvanley* is reported to have used with reference to that of *Clennell v. Lewthwaite* (a); — “The rule is clearly established, that the executor shall have the residue, unless there is a strong and violent presumption to the contrary; that a legacy to him affords that presumption; but that it is not so strong to take away his legal right, as to deprive him of the opportunity of proving, by parol evidence, that the Testator did intend he should have it.”

The next consideration is, whether in this case the executor has been able to establish by parol evidence — he being clearly excluded by the will, if you do not apply the parol evidence — that the Testator did intend he should have the surplus at the time when he appointed him executor; and, applying the principles adopted in former cases to this question, have no hesitation in saying that, as different Judges might have decided those cases otherwise than we find them decided, so different Judges might come to a decision

(a) 2 Ves. jun. 474.

upon the present case, different from that which I have come to; for we are obliged in all such cases to go a great way by guess and conjecture.

1816.

 LANGHAM
 v.
 SANDFORD.

[His Lordship then went through the evidence, which was in substance the same as is detailed in the Report of the case (a) above referred to.]

Now, with regard to the inference drawn on each side from the design, which the Testator appears to have had, of making Mr. Scott an executor jointly with Mr. Sanford, it is to be remarked that the proposition to nominate him came from the Testator, and the observation "that one executor would be sufficient," from Mr. Scott; and it is the most difficult thing in the world to imagine that the Testator could have intended to make the appointment of his executor carry with it the beneficial interest in the residue, and thus to give Mr. Sanford the whole residue, merely in consequence of Mr. Scott's declining the appointment, when, if Mr. Scott had accepted it, they would have taken it equally between them.

<p>Then it is said, that if a Testator gives a legacy by one paper, and appoints the legatee his executor by another paper, the rule of violent presumption does not apply; and that it amounts to the same thing in the present case, the appointment of executor being subsequent to, and unconnected with, the gift to him of the legacy, several other legacies being in-</p>	<p>Where a Testator gives a legacy to A. by his will, and afterwards by codicil appoints A. his executor, <i>quære</i> if the</p>
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violent presumption to exclude him from the surplus arises.

But where the appointment follows the gift of the legacy, though at any interval, in the same instrument, the rule does apply, because the whole instrument must be construed to have effect at once from the moment of signature.

(a) 17 Ves. ubi sup.

1816.

LANGHAM

v.

SANFORD.

terposed. But whatever the rule may be as to the gift and appointment by two distinct papers, (a question which I am not called upon to decide,) that reasoning does not apply in the present instance. I am bound to construe the will altogether; to say that it was no will at all until executed; and that the Testator, at the time of its execution, contemplated every part of it as having effect at one and the same time. Consequently the rule of presumption is equally applicable to this case as where the appointment of executor follows, in words, immediately after the gift of the legacy.

But, again referring to the Testator's intention to appoint *Scott* a co-executor, it is observed that no case ever occurred more strongly showing the absurdity of the rule of presumption; since, if that appointment had taken place, whether the Testator had given *Scott* the legacies he has given him, or not, he would equally have taken his share of the residue with the other executor, unequal legacies to two executors not excluding either. I think, however, there is a fallacy in that argument; for, although if they had been made co-executors solely by the introduction of Mr. *Scott's* name into that paper, my persuasion would have been that I was acting contrary to the Testator's real intention in adjudging to them the residue, yet my persuasion must have given way to the rule of law in that respect. There is also another answer to it: if it be the rule that a legacy given to an executor raises a violent presumption against his taking the residue, I am bound to presume that the Testator was himself acquainted with that rule, and has intentionally excluded Mr. *Sanford* from the residue; but I cannot tell that, if he had carried his intention into effect, of appointing Mr. *Scott* joint-executor, he would not have guarded against his executors taking

In construing a will, it is to be presumed that the Testator was acquainted with the rules of law.

the residue, by expressing his intention to the contrary; and it is therefore impossible for me to act upon the supposition that he would in that case have stopped at the mere appointment of executors.

1816.

 LANGHAM
 v.
 SANFORD.

Then, with regard to the evidence of declarations made by the Testator after the date of his will, I think they amount to very little. They may have been made for the purpose of misrepresenting what he had actually done; but at all events cannot be taken as counteracting the effect of what had been done. The evidence of his declarations before he made his will are of more weight, but still not to be regarded in the same light, with respect to authority, with those which passed at the time of making the will, since they are at the most explanatory of what was his particular intention at the moment of pronouncing them. In such cases, therefore, the best evidence is the contemporary evidence; and all the rest weighs very little in the scales.

Where parol evidence is let in to explain a will, the first evidence is that of declarations made at the time of executing it. The evidence of declarations made before and after are entitled to little attention in comparison with this.

The cases of *The Bishop of Cloyne v. Young* (a), and *Nourse v. Finch* (b), have been alluded to. In the latter of those cases I argued on the part of the Defendant the executor; and I was once of opinion that both cases had been decided improperly; but I have since corrected that opinion, and am now convinced that the decisions are perfectly right. Still, I cannot quite agree with some of the positions that were made in the latter case. It was contended that, because the Testator had made a codicil which he left unexecuted, therefore the case was like that of *The Bishop of Cloyne v. Young*. Now, in *The Bishop of Cloyne v. Young*, the Testator had appointed executors, and in the same paper says, "I give and

(a) 2 Ves. 91.

(b) 1 Ves. 344.

1816.

LANGHAM

v.

SANDFORD.

“ bequeath the remainder of my estate, real and personal —” and there ends ; and Lord *Hardwicke* was of opinion that he had thereby manifested a purpose that his executors should not take the residue, and they were excluded, not because he had given them legacies, but because he had manifested an inchoate intention to appoint a residuary legatee.

Now I think the strong evidence against the executor in the present case, is the fact of the antecedent preparations of the paper C, and the conversation which took place between the Testator and Mr. *Scott*, at the time of making the will. So in *Nourse v. Finch*, the intention of giving the residue was manifested, not by the will, but by the unexpected codicil ; and Dr. *Chapman* (who was Vice-Chancellor of *Oxford*) expressly stated in his evidence, that Mr. *Thomas Walker*, of *Woodstock*, (who prepared the will,) when he was asked, after the Testator's death, who would take the residue, said, “ To be sure, Miss *Finch*, as executrix.”

Upon the whole I am of opinion that, attending to all the circumstances of this case, I am bound to say the Testator did not, according to the rule of law, intend that his executor should take the residue beneficially. And I am very sorry for it, because I believe that in this case, as in many others, the rule of law does disappoint the Testator's real intention. But I am so fettered by precedent that I cannot determine otherwise.

I am therefore of opinion that the decision of the *Master of the Rolls* is right.

[Decree affirmed.] (a)

(a) Reg. Lib. B. fo. 390.

1816.

Nov. 18.

CHAMBERS v. BRAILSFORD.

THIS Cause came on upon Appeal from the Decree of the *Master of the Rolls* (a), who was of opinion that *Thomas Brailsford* the younger was the only person intended to take under the devise, "to the use of the said *Thomas Brailsford*, for life, and after his decease to the use of the said *Thomas Brailsford*, son of the Testator's nephew, *Samuel Brailsford*," he being the only *Thomas Brailsford* before-mentioned; notwithstanding the seeming inconsistency of the two limitations, and there being another *Thomas Brailsford*, the nephew of the Testator.

The LORD CHANCELLOR.

Whatever my opinion may be as to the probable intention of the Testator, I am bound in this case by the rules of law; and, unless what has gone before, and what comes after the limitations in question can be taken to authorize the Court to strike out the words "*the said*," there is no doubt those words must be taken to refer to the *Thomas Brailsford* before-mentioned.

To authorize the rejection of words in a will, there must be an absolute impossibility of construing the will, those words being retained. The mere improbability that a Testator could have meant what he has expressed, neither amounts to a cause for rejection, nor renders the devise void for uncertainty.

To enable the Court to decide otherwise, there must either be such impossibility of construing the devise so as to relate to that *Thomas Brailsford*, as to authorize the rejection, or so much uncertainty as to render it altogether void, and let in the heir at law. The rule is not to reject any words in a will, unless there cannot be any rational construction of those

(a) 18 Ves. 368.

1816.

CHAMBERS

v.

BRAILSFORD.

words as they stand. Now in this case, the great improbability of the Testator's having intended to give the fee, where he has in the first place given an estate for life only, does not amount to that utter impossibility of construction which the law requires. The decree at the *Rolls* must consequently be affirmed.

[Decree affirmed.](a)

(a) Reg. Lib. A. 489.

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ROLLS.

Nov. 18—21.

TATTERSALL v. HOWELL.

Legacy, upon condition that the legatees shall change the course of life he has too long followed, and give up all low company, and frequenting public houses, &c.

ELIZABETH Tattersall, widow, by her Will, dated *March 8, 1790*, gave the residue of her personal estate to trustees, upon trust, to invest in government or real securities, and to permit her son (the Plaintiff) to receive the interest for his life, and after his death, to transfer the principal to his child or children, in equal shares, and if there should be no such child, to the Testatrix's daughter, *Mary Ann Cottin*, and her children, as therein mentioned, and appointed her daughter executrix.

The condition is as such a Court will carry into effect; and the evidence not being conclusive, an Inquiry was directed, following the words of the will.

By a Codicil dated the 11th of *July, 1802*, she gave as follows: "Provided my son (the Plaintiff) changes the course of life he has too long followed, and will give up all his low company, and frequenting public houses entirely, I then leave him (but not otherwise) the interest of £5,500, out of my residue, for his life, and at his death to go to the residue, that is, if he leave no issue by a marriage that shall be approved of by my said trustees; then and in such case," (viz. of his leaving issue,) "at his death I leave the £5,500, to his issue equally at 21. But should the Almighty in his great mercy restore him

“ to health, and should he continue in the same
 “ course of life he has followed for many years, in
 “ keeping low company, and frequenting the public
 “ houses, which must end in his total ruin, — I say,
 “ if he will not give them up entirely, — then I only
 “ leave him £50 a-year for life, to be paid by my
 “ trustees out of the residue, and £30 mourning.

1816.
 TATTERSALL
 v.
 HOWELL.

By another Codicil, without date, after stating that the Plaintiff's conduct and behaviour had for some years past been very reprehensible, in frequenting public houses, and drinking to excess, and keeping low company, she directed as follows: “ if my said son will continue to go on in the way he has done against the advice of all his friends, I then allow him only £50 a-year for his life, to be paid him by my trustees, and £20 for mourning, and my residue to go as I shall hereafter direct, except a reserve I make of £5,500, should it please God in his good time to convince him of his error, and change his heart and conduct, which is my daily prayer that he may do,” &c. And in that event, she directed the interest of the said £5,500, to be paid to the Plaintiff for his life, “ that is to say, if my said son conform to my restrictions, but not otherwise;” and at his death to go to the residue, unless he should have issue by any marriage with the consent of all the trustees, in which case it was to go to such issue after his decease, as already directed: and she gave the entire residue to her two grand-daughters, daughters of the said *Mary Ann Cottin*.

Two questions were raised upon the will and codicils. First, whether the condition upon which the interest of the £5,500 was given to the Plaintiff for life, is such a condition as this Court can give effect to; and secondly with regard to the effect of the evidence, whether it

1816.

TATTERSALL

v.

HOWELL.

was sufficiently proved that the Plaintiff had abandoned low company, excessive drinking, and ale-houses. There was evidence on both sides, and some of the witnesses examined had contradicted each other.

Sir *S. Romilly* and *Wear*, for the Plaintiff, claimed the interest of the £5,500, as given absolutely, the condition expressed being so vague as not to be capable of being enforced by a court of justice.

Hart and *Rose*, for the Defendants, (the residuary legatees,) contended, on the contrary, that the condition was not so vague as to be incapable of being enforced; and instanced the words of the statute, 4 & 5 *W. & M. c. 23. s. 10.*, by which "inferior tradesmen and dissolute persons" are made liable to costs under the circumstances there mentioned.

Sir *S. Romilly*, in reply, said that the uncertainty complained of on the face of these instruments, consisted in the conduct pursued by the Plaintiff being stated as against the advice of his friends, to which his reformation was to be made conformable; and that by the last codicil, the Testatrix had in effect revoked the former, adding to it only the restriction in respect of excessive drinking. That with regard to the evidence, it is not necessary, because it appears in some points to be contradictory, that it should therefore be referred to the Master, the Court being capable of coming to a satisfactory conclusion for itself, without the aid of the Master's report.

The MASTER of the ROLLS, however, decided that the Condition upon which the Interest of the £5,500 was given, was a valid condition, and capable of being enforced; but thought, upon considering the effect

of the evidence, that it was not sufficiently conclusive on either side to enable him to proceed without a reference.

1816.
TATTERSALL
v.
HOWELL.

The Order was accordingly made, whereby it was referred to the Master to enquire and state to the Court whether the Plaintiff had discontinued, and how long, to frequent public houses, drinking to excess, and keeping low company, according to the codicil. For the purpose of making such enquiry, the parties to be examined on interrogatories, &c. Further directions reserved (a).

(a) Reg. Lib. B. 89.



LORD BYRON v. JOHNSTON.

Nov. 28.

THE Defendant, a publisher, advertised for sale certain poems, which he represented by the advertisement to be the work of Lord *Byron*, on whose behalf a Bill was filed (His Lordship being himself abroad), for an Injunction to restrain the publication under the title described in the advertisement; and, on affidavits made by His Lordship's agents, both as to their belief and also as to circumstances rendering it highly probable that the work was not His Lordship's, an application was made to the *Vice-Chancellor* accordingly; when His Honour, upon the ground that the affidavits were not sufficiently positive, and might be contradicted, ordered that notice of the motion should be given to the Defendant.

Injunction, until answer or further order, to restrain the publication of a work as the Plaintiff's, upon affidavit by the Plaintiff's agents, (the Plaintiff himself being abroad,) of circumstances making it highly probable that it was not the Plaintiff's work, and the Defendant refusing to swear as to his belief that it was so.

Notice having been given pursuant to this Order the application was now renewed before the *Lord Chancellor*, who approved of the course which had been taken

1816.

BYRON
v.
JOHNSTON.

by the *Vice-Chancellor*; and, upon the Defendant declining to swear as to his belief that the poem in question was actually the work of Lord *Byron*, granted the motion.

An Injunction was issued accordingly, to restrain the Defendant from publishing, in the Plaintiff's name, or as his work, the several poems mentioned in the advertisement, or any parts thereof, till answer or further order. (a)

(a) Reg. Lib. R. 62. b.



ROLLS.
Nov.

GEORGE HOLME SUMNER, PLAINTIFF;

AND

WHISTON POWELL, SARAH POWELL,
GEORGE WILKINSON, and SUSANNAH
BLACKMORE, - - DEFENDANTS.

Joint covenant of indemnity not extended in equity beyond its legal operation, there being no ground on which to infer

mistake in the nature of the instrument, and no previous equity entitling the covenantee to a several indemnity from each of the covenantors.

Not a principle of equity that ever joint covenant shall be considered as if it were joint and several.

When the obligation exists only by virtue of the covenant, its extent is to be measured only by the words of the covenant.

Different, where the obligation is independent of the particular contract, as in the case of partnership debts, bonds, &c.

IN 1792, *Samuel Castell*, *Walter Powell*, and *William Sumner* (the Plaintiff's testator,) carrying on business in partnership, as bankers, under the firm of *Castell, Powell*, and Co. received a power of attorney from the trustees in the marriage-settlement of *Cookson* and wife to receive dividends on £5,325 stock, including an authority to transfer. Under this authority, *Powell* alone,

in the month of *August* in that year, sold the stock, and applied the produce to the purposes of the partnership, without the knowledge either of the trustees or of his partners.

1816.
SUMNER
v.
POWELL.

Some time after this transaction took place, the name of *Wilson*, who had for many years acted as clerk to the partnership, at a fixed salary, appeared for the first time in the firm as one of the partners, and continued to be so used till *December*, 1808, when he quitted the partnership; but, during the whole of that time, it appears that he had no participation in the partnership profits, only retaining his former salary.

In 1795, *Walter Powell* the younger was admitted into the partnership.

In *June*, 1797, *Sumner* died, having appointed the Plaintiff his sole executor; and by Indenture, dated the 20th of *May*, 1801, between the Plaintiff of the one part, and the surviving partners (including *Wilson*) of the other part, reciting “ that the said *William Sumner* “ at the time of his death, and for some years previous “ thereto, was a partner with the said *Samuel Castell*, “ *Walter Powell* the elder, *Walter Powell* the youn- “ ger, and *William Wilson*, in the banking business, “ which partnership determined by the death of the “ said *William Sumner*, so far as regarded his interest “ in the partnership; and that the partnership ac- “ counts between the said *William Sumner* and his said “ partners were unsettled for several years previous to “ his death, and that much question had arisen be- “ tween the Plaintiff, as executor of the said *William* “ *Sumner*, and the said *Samuel Castell*, *W. Powell* “ the elder, *W. Powell* the younger, and *W. Wilson*, “ as to the statement of the partnership accounts up “ to the day of the death of the said *W. Sumner*, and

1816.

SUMNER.

v.

POWELL.

“ as to the amount or valuation of the partnership
 “ effects at that time ; and further reciting, that the
 “ Plaintiff, on or about the 22nd day of *November*,
 “ 1798, took up from the said *Samuel Castell, &c.* the
 “ sum of £1,500, intending to consider the same as
 “ in part of the monies which should be due from the
 “ partnership to the estate of the said *William Sum-*
 “ *ner*, but giving his note for repayment thereof, with
 “ interest, by way of security, in case such sum
 “ should not be found due to him ; and that, to put
 “ an end to all questions that might arise upon any
 “ of the matters aforesaid, the Plaintiff had proposed,
 “ in consideration of the delivery up to him of his
 “ said note, and of the payment of a further sum of
 “ £2,750, to give up all farther claim or demand upon
 “ the partnership in respect of the interest of the
 “ said *William Sumner* therein, and to release or as-
 “ sign to them the said *Samuel Castell, &c.* all his
 “ share and interest as executor of the said *William*
 “ *Sumner*, of and in all the outstanding debts due and
 “ owing to the said copartnership, they the said *Sam-*
 “ *uel Castell, &c.* agreeing, not only to make such
 “ payment, but to execute to the Plaintiff a release of
 “ all demands upon the estate of the said *William*
 “ *Sumner*, and to indemnify him against all engage-
 “ ments or responsibility which the estate of the said
 “ *William Sumner* might be liable to from his having
 “ been in partnership as aforesaid ; which proposal
 “ had been acceded to” — It was witnessed, “ that,
 “ in consideration of the delivery up to the Plaintiff
 “ of his said note for £1,500 and interest, (which was
 “ then cancelled, and in consideration of the fur-
 “ ther sum of £2,750, and of the release and covenant
 “ of the said *Samuel Castell, &c.* thereafter contain-
 “ ed, the Plaintiff assigned and released to the said
 “ *Samuel Castell, &c.* all his share and interest, as per-
 “ sonal representative of the said *William Sumner*, of

" and in all and singular the credits and effects of the
 " late co-partnership, and of and in all sums of money
 " and securities outstanding or due to the said co-
 " partnership, either at the time of the death of the
 " said *William Sumner*, or at the day of the date of
 " the said indenture; to hold, &c. unto the said *Samuel*
 " *Castell*, &c. to and for the sole use and benefit of
 " them, their executors, administrators, and assigns,
 " absolutely and for ever." And it was thereby fur-
 " ther witnessed, that, for the considerations afore-
 " said, the Plaintiff released and discharged them the
 " said *Samuel Castell*, &c. and every of them, their and
 " every of their executors and administrators, of and
 " from all claims and demands whatsoever which the
 " Plaintiff, as executor of the said *William Sumner*,
 " might have against them, or on account of any share
 " in the said partnership concern; and that, in consi-
 " deration of such release, they the said *Samuel Cas-*
 " *tell*, &c. did, and every of them did, release, acquit,
 " and for ever discharge the Plaintiff, as such executor
 " as aforesaid, his executors and administrators, and
 " all and singular the estate and effects of the said
 " *William Sumner*, of and from all claims and de-
 " mands whatsoever, which they the said *Samuel Cas-*
 " *tell*, &c. or any of them might have against the Plain-
 " tiff, as such executor, by reason or upon account of
 " the said *William Sumner* having been a partner with
 " them as aforesaid." And in the said indenture was
 " also contained the following covenant; " And the said
 " *Samuel Castell*, *Walter Powell* the elder, *Walter*
 " *Powell* the younger, and *William Wilson*, for them-
 " selves, their heirs, executors, and administrators,
 " do hereby covenant, promise, and agree, to and with
 " the said (Plaintiff) his executors and administrators,
 " that they the said *Samuel Castell*, &c. their heirs,
 " executors, and administrators, shall and will, from
 " time to time, and at all times hereafter, save

1816.
 SUMNER
 v.
 POWELL.

1816.
 SUMNER.
 v.
 POWELL.

“harmless and keep indemnified the said (Plaintiff)
 “his heirs, executors, and administrators, and his
 “and their estates and effects, goods and chattels,
 “and all and singular the estates and effects of the
 “said *William Sumner* deceased, of and from all and
 “singular the debts and engagements of the said late
 “co-partnership, wherein the said *William Sumner*
 “was concerned as aforesaid : and of and from all
 “payments in respect thereof, and all costs, charges,
 “suits, actions, damages, and demands, whatsoever,
 “which can, shall, or may be incurred, sustained,
 “prosecuted, or recovered, against the said (Plain-
 “tiff) his executors or administrators, as personal
 “representative of the said *William Sumner*, or to
 “which the estate and effects of the said *William*
 “*Sumner* can, shall, or may be liable, in any way
 “howsoever, by reason of his having been a partner
 “in the said partnership concern.”

In 1802, *Walter Powell* the elder died, having appointed the Defendants *Whiston Powell* and *Sarah Powell*, executors of his will.

In December, 1803, *Wilson* quitted the partnership.

In September, 1804, *Castell* and *Walter Powell* the younger (the two continuing partners) became bankrupt.

In 1805, *Wilson* died, having appointed the Defendants, *Wilkinson* and *Blackmore*, executors of his will.

In 1806, a bill was filed by the parties interested under *Cookson's* settlement against the surviving trustee of that settlement, and against the bankrupts and their assignees, and against the representatives of all the deceased partners, to have the stock re-

placed, or for an account of the produce thereof, with interest from the time of the transfer.

1816.

SUMNER

POWELL.

On the 14th of *July*, 1800, an order was made in that cause, by which it was declared that the present Plaintiff, one of the Defendants thereto, admitting assets of his Testator, and the other Defendants, the representatives of *Powell* the elder, and *Wilson*, were liable, out of the assets of their respective Testators, to pay what should be found due, for principal and interest, on taking the account thereby directed; and it was ordered that they should pay the same accordingly.

The bill brought by the present Plaintiff, after stating the above facts, and that he, the said Plaintiff, had already, as such executor of *G. H. Sumner*, deceased, under the said order and a decree made on further directions, paid into the bank the sum of £1256 for interest on the principal sum reputed due, and was then liable to pay the further sum of £2064, with interest and costs; and after further stating that *Castell* had since died an uncertificated bankrupt, and that *Walter Powell* the younger, having obtained his certificate, had become bankrupt a second time, but no assignment of his estate and effects had yet been executed; insisted that, by virtue of the deed of indemnity, dated the 20th of *May*, 1801, he was entitled to be repaid out of the estates of the two *Powells* and *Wilson* all such sums as he had already paid, or should pay, under the said decree; therefore praying accordingly.

To this bill the Defendants (the executors of *Wilson*) put in an answer, alleging, that although the name of the Testator appeared in the banking concern, yet in fact he never was a partner therein, or in

1816.

 SUMNER
 v.
 POWELL

any manner participated in the profits or losses thereof; and therefore insisted that his estate was no way subject or liable to repay the Plaintiff what he had so paid, or should pay, in pursuance of the said decree.

The question was as to the liability of *Wilson's* estate under the covenant in the deed of indemnity; and this depended on the effect of that deed, as constituting an obligation which, though only joint at law, would, as it was argued, be held in equity to be several as well as joint, and therefore binding on the estate of the deceased covenantor.

Hart and Heald, for the Plaintiff.

Sir *S. Romilly*, *Wetherell*, and *Barber*, for the representatives of *Wilson*.

For the Plaintiff were cited, *Bishop v. Church* (a), *Primrose v. Bromley* (b), *Hoare v. Contencin* (c), and the words of Lord *Eldon*, in *Ex p. Kendal*. (d)

The MASTER of the ROLLS:

The question is, whether any other effect can be given to this covenant in equity than it has at law. It has never been determined that every joint covenant is in equity to be considered as the several covenant of each of the covenantors. In the late case of *Devaynes v. Noble* (e), I had occasion to examine the authorities on this subject, and found no such general proposition any where laid down. When the obligation exists only by virtue of the covenant, its extent can be measured only by the words in which it is con-

(a) 2 Ves. 100, 371.

(b) 1 Atk. 99.

(c) 1 Bro. 27.

(d) 17 Ves. 525. See ante, vol. i. p. 547.

(e) Ante, vol. i. p. 563. The judgment in *Sleech's* case.

ceived. A partnership debt has been treated in equity as the several debt of each partner, though at law it is only the joint debt of all. But, there, all have had a benefit from the money advanced or the credit given, and the obligation to pay exists independently of any instrument by which the debt may have been secured. So, where a joint bond has, in equity, been considered as several, there has been a credit previously given to the different persons who have entered into the obligation. It was not the bond that first created the liability to pay. But in this case the covenant is purely matter of arbitrary convention, growing out of no antecedent liability in all or any of the covenantors to do what they have thereby undertaken.

1816.
SUMNER
v.
POWELL.

Instead of winding up the partnership concern, and dividing what might remain, after satisfying all claims upon it, the parties make an arrangement, by which Mr. Sumner was immediately to receive what was estimated to be his testator's share of the joint estate, he releasing to the other partners all interest in the residue. Why was Mr. Sumner's share of the partnership estate to remain unaffected by any claims by which that estate might afterwards be diminished? There was no equity that entitled him to demand from the other partners an engagement to that effect. But they are contented to give him a covenant of indemnity. As it is only a joint covenant that is given, how can I say that it is any thing more than a joint covenant that was meant to be given?

It is not attempted to be shewn that there was any mistake in drawing the deed, or that there was any agreement for a covenant of a different sort. There is nothing but the covenant itself, by which its intended extent can be ascertained.

1816.

 SUMNER
 v.
 POWELL,

There is no ground, therefore, on which a Court of Equity can give it any other than its legal operation and effect.

[Bill dismissed, without costs.]

ROLLS.
 Dec. 6, 1816.

GLANVILL v. GLANVILL.

Testator, after making a provision for the maintenance of his children, gives "all the rest, residue, and remainder of his real and personal estate," to his son *T. W. G.*, "to be a vested interest on his attaining the age of 21;" and, "if he shall happen to die before 21," then to his daughter *E. G.* with remainders over.

THE question in this cause arose on the residuary bequest in the will of *Edward Glanvill*, who, after making a provision for the maintenance of his son *Thomas William*, and of his daughter *Emily*, gave the residue of his property in the following words:—
 "And, as to all the rest, residue, and remainder of my estate and effects, as well real as personal, or of what other nature or kind soever, I give and devise the same unto and to the use of my son *Thomas William Glanvill*, according to the nature of the same estates respectively, and to be a vested interest upon his attaining the age of 21, provided that, in case my said son shall happen to die before attaining the said age of 21, then all the rest and residue of my said real and personal estate so given and devised unto him, shall go and belong to my daughter *Emily Glanvill*;" with other trusts in remainder.

The rents and profits are to accumulate until *T. W. G.* attains the age of 21, or dies under that age.

The Bill was filed by the Testator's son and heir at law, *Thomas William Glanvill*, an infant, against his father's executors and against his sister *Emily*, (also an infant,) and the several persons entitled in remainder, and the principal point which it raised, was the following; viz. whether the infant Plaintiff was entitled, during his minority, to the rents and profits of the residuary real and personal estate.

Agar and Wyatt, for the Plaintiff, cited Nicholls v. Osborne (a), Taylor v. Johnson (b), Montgomerie v. Woodley, (c).

1816.
GLANVILL
v.
GLANVILL.

Hall, Shadwell, and Wingfield, for different Defendants.


The cases referred to are where a legacy is vested, liable to be divested. Here there is an express declaration that it shall not vest till the son attains 21. Many cases establish that, where residuary personal estate is given upon a contingency, the profits, until the contingency happens, are to accumulate. And the same is the case with a residuary devise of land. *Stephens v. Stephenson (d), Studholme v. Hodgson (e), Butler v. Butler, (f), Trevanion v. Vivian (g), Rogers v. Gibson (h), &c.*

The MASTER of the ROLLS :

Considered that it would be difficult to get over the precise words of the will, directing that the legacy should vest at 21. There could not be two periods of vesting, and by fixing one, the Testator must be taken to have excluded the other. The sentence itself was so worded, that the direction as to vesting formed a necessary part of it, and the remainder could not be construed without it. Besides, there was no evidence from any part of the will, that the Testator did not affix to the word its precise legal meaning.

- (a) 2 P. Wms. 419.
- (b) 2 P. Wms. 504.
- (c) 5 Ves. 522.
- (d) Forr. 228.
- (e) 3 P. Wms. 299.

- (f) 3 Atk. 58.
- (g) 2 Ves. 430.
- (h) 1 Ves. 485. Amb. See Roper on Legacies, vol. xi. p. 205—212.

1816.

 GLANVILL
 v.
 GLANVILL.

It was therefore declared, that by virtue of the will of the Testator, the rents and profits of the residue of his real estate, and the interest and dividends of the residue of his personal estate (after payment of the annuities given by the will), were to accumulate until the Plaintiff should attain 21, or until his death, which should first happen. Upon attaining twenty-one, the Plaintiff, or, upon his death under that age, the person or persons entitled to or interested in such accumulations, to be at liberty to apply as they should be advised. (a)

(a) Reg. Lib. A. 324.

Dec. 6, 7.

JOHN AUGUSTUS SULLIVAN, (an Infant), by
 OLDAKER, (his next Friend), PLAINTIFF;

AGAINST

The Right Honourable JOHN SULLIVAN,
 DEFENDANT;

And the said J. A. SULLIVAN, by Sir CHARLES
 SULLIVAN, (his next Friend), PLAINTIFF;

AGAINST

The same DEFENDANT.

Where two suits are instituted in the name of an infant by different persons acting as his next friends, it is of course to refer it to the Master, to see which is most for the infant's benefit, upon the mere allegation of the council, that both suits are for the same purpose: it being at the risk of the party moving, in case the allegation should prove untrue, to have the order for reference discharged with costs upon the special application of the other party.

Upon such a reference, the Master is at liberty to suggest any improvement in the frame of the suit, and to report any special circumstances that may be for the infant's advantage.

quire and state to the Court, which of the two suits it was most proper and most for the advantage of the infant should be prosecuted on his behalf, and that all proceedings in both the suits, except such as might be required in pursuance of such reference, might be staid until the Master should have made his report.

1816.
SULLIVAN
2.
SULLIVAN.

Both Bills prayed an account against the Defendant, (the Plaintiff's father,) of the fees and emoluments of a patent office, to which the Plaintiff had been appointed in the year 1803, when (he being then an infant of tender years) his father had entered into, and had ever since continued in, the receipt of those fees and emoluments; and for an injunction to restrain him from receiving the same in future. The first bill, (which was filed on behalf of the infant by the father of a young woman, whom it was alleged that he had clandestinely married, and, as appeared by a letter from the Plaintiff, which was produced in support of the motion, without the Plaintiff's knowledge,) prayed in addition a declaration that the carrying away the Plaintiff into a foreign country by the Defendant, by the means, and under the circumstances, and for the objects in the bill charged, was an abuse of parental authority, and that the Defendant might be ordered forthwith to bring the Plaintiff within the jurisdiction; also an allowance for maintenance, and a receiver *durante minore ætate*.

Leach and Eden, in support of the motion.

Sir Arthur Piggott and Blake, for the Defendant in both suits, also warmly contended for the reference to

1816.

 SULLIVAN

SULLIVAN.

the Master, and cited *Mitford*, p. 26. (a), and *Da Costa v. Da Costa*. (a)

Sir *S. Romilly* and *Treslove*, on the part of the Plaintiff in the first suit, resisted the application on the ground, 1st, That the two suits were for different objects; 2dly, That the second suit was not meant to be *bona fide* prosecuted; and this they inferred from the eagerness evinced by the Defendant in support of the application. They also argued that the objections made to the first bill as containing scandalous and irrelevant matter, ought to have been supported by affidavit, pointing out the passages so objected to, in order to lay a sufficient ground for the reference.

Leach, in reply, insisted that an affidavit was unnecessary, in support of the application, since it was not for the Court to decide in the first instance, but after the Master should have made his report; and he said there was no intimation of the practice being otherwise. That in *Da Costa v. Da Costa*, the Lord Chancellor did not decide upon the affidavits which

(a) "As some check upon the general license to institute a suit on behalf of the infant, if it is represented to the Court that a suit proposed in his name is not for his benefit, an enquiry into the fact will be directed to be made by one of the Masters; and, if he reports that the suit is not for the benefit of the infants, the Court will stay the proceedings; and if two suits for the same purpose are instituted in the name of an infant, by different persons acting as his next friend, the Court will direct an enquiry to be made in the same manner which suit is most for his benefit; and when that point is ascertained, will stay proceedings in the other suit,"

(b) 3 P. Wms. 140.

were produced, but left it to the Master to form his judgment on the state of facts to be laid before him. That, with regard to the two bills not being for the same purpose, the only relief prayed by the one which did not make part of the prayer of the other, viz. that the Defendant might bring the Plaintiff within the jurisdiction, was irregular; the proper course being by petition, the infant being a ward of Court.

1816.
SULLIVAN
v.
SULLIVAN.

The LORD CHANCELLOR ;

Desired to look into both the bills ; and afterwards said it might have been moved, as of course, to refer it to the Master, to see which of the two suits was most for the infant's benefit, the result of the reference being at the risk of the party making the application, and the Court being satisfied in the first instance, by the allegation of counsel, that the two suits were for the same purpose, which, if it should turn out otherwise, might be subsequently made the ground for moving to discharge the order, with costs to be sustained by the party so improperly obtaining it. He also said that it is competent for the Master, upon such a reference, (as well on the authority of *Da Costa v. Da Costa*, as on general principle,) to point out to the Court any improvement that might be made in the form of the suit, or any other circumstance that might appear to him to be for the infant's benefit.

The Order was made accordingly, referring it to the Master to enquire and state to the Court which of the two suits it was most proper and for the advantage of the infant should be prosecuted ; in making such enquiry, to be at liberty to state any special circumstances. Such further order as might appear to be

1816.

SULLIVAN

v.

SULLIVAN.

proper to be reserved, till after the Master shall have made his Report. (a)

[Reg. Lib. B. 257.]

(a) I have been favoured with the following note by Mr. Eden: —

Wyriott Owen (an infant), by
Thomas Carthew, his uncle
and next friend, Plaintiff;

AGAINST

Ann Owen, Hugh Barlow,
and Others, Defendants;

And the said *Wyriott Owen*,
by *Hugh Barlow* his next
friend, Plaintiff;

AGAINST

The said *Ann Owen*, and
Others, Defendants.

Upon the petition of the infant, setting forth that a bill had been filed by his father and himself (by his father as next friend); that his father was since dead, having appointed *Hugh Barlow* his guardian, whereupon the infant, by his next friend *Carthew*, filed a supplemental bill and bill of revivor against the said *Hugh Barlow*; that another bill had been subsequently filed by the said *Hugh Barlow*, as next friend to the

infant; that there was room to suspect that his interests might not be properly taken care of in the last-mentioned suit, and that he could not have all the relief by that suit as by the other; inasmuch as relief was thereby prayed against the said *Hugh Barlow* as a defendant, in respect of matters of which no notice was taken in the bill so filed by the said *Hugh Barlow*; it was ordered that it be referred to the Master to examine and certify whether the two bills were brought touching the same matter, and in what respect they differed, and which of the said bills was most proper to be proceeded upon. [Reg. Lib. B. 1756. fo. 365.]

The Master having by his report stated the differences between the two bills, and that he was of opinion, the former was most proper to be proceeded upon, the report was confirmed by order, dated the 24th Nov. 1757. [Reg. Lib. B. 1757. fo. 24.]

CASES IN CHANCERY.

45

Between EDWARD HILL and THOMAS THOMPSON - - - PLAINTIFFS;

1816.

Dec. 7—10.

AND

ANN ATKINSON, TABITHA LEAKE, and THOMAS WHITEHEAD and wife, DEFENDANTS.

And between ANN ATKINSON, PLAINTIFF;

AND

E. HILL, T. THOMPSON, WHITEHEAD and Wife, and TABITHA LEAKE, DEFENDANTS;

And between MARY ANN GALE, (Wife of JOHN GALE) - - - PLAINTIFF;

AND

JENNER and Wife, (late ANN ATKINSON,) and CHIPPENDALE - - DEFENDANTS.

JAMES SMITH, by his Will, directed his debts to be first paid, and then gave to *Hill and Thompson*, £3000, upon trust to invest the same in government-securities, and to pay the interest to *Ann Atkinson* for her life, and after her decease, to apply the same to the maintenance and education of the child with which she was then ençoint, and to transfer the principal to such child on its attaining twenty-one; but in case it should die under twenty-one, then to *Tabitha Leake*, her executors, administrators, and assigns. And he thereby directed the said *Hill* and *Thompson* to invest the said £3000 in the funds, as

£3000 given by will to trustees, upon trust to invest, and to pay the interest to *A.* for life, and after her death to transfer the principal to *B.*

Under a decree, this legacy is paid by the trustees into

Court, and invested in stock in the name of the accountant-general, previous to the imposition of the duty on legacies by 20 G. 3. c. 28. *B.* being then an infant, and therefore incapable of discharging the trustees.

This is a sufficient appropriation of the legacy within the words of the act of 48 G. 3. c. 149. "paid, retained, satisfied, or discharged," before the 10th of Oct. 1808; and therefore, upon a question arising at the time of the principal becoming payable, it was determined that no legacy duty was chargeable in respect of it.

1816.

HILL

v.

ATKINSON.

soon as conveniently might be after his decease, and appointed them executors of his will.

The Testator died on the 21st of *July*, 1776, and his will was proved by both the executors. *Ann Atkinson* had no child : and by a Decree pronounced at the Rolls on the 9th of *March* 1779, it was declared that the said *Ann Atkinson* was entitled for life to the interest of the £3000 legacy, at the rate of £4 *per cent*, and that *Tabitha Leake* was entitled to the principal, subject to such interest of the said *Ann Atkinson* ; and ordered that the principal should be paid into the bank, and laid out in the name of the accountant-general, in the purchase of bank annuities, in trust in the causes, "*Hill v. Atkinson*" and "*Atkinson v. Hill*;" the interest to be paid to the said *Ann Atkinson*, for her life ; and at her decease, that *Tabitha Leake*, (who was then an infant,) should, on attaining twenty-one, or sooner, if occasion, be at liberty to apply for a transfer.

Under this Decree, the executors paid the £3000 into the bank during the same year 1779, and the sum when paid in was laid out, in the name of the accountant-general, in the purchase of £3 *per cent consols*. in trust as thereby directed, the interest whereof was paid to or received by the said *Ann Atkinson* during her life, in satisfaction of her legacy.

By the Settlement made on the marriage of *Tabitha Leake* with *Thomas Ward*, (31st *July* 1792,) the interest of the said *Tabitha Leake* in the said £3000 was transferred to trustees for the purposes therein mentioned.

17th *January*, 1794, *Tabitha Ward* (late *Tabitha Leake*) died ; and in 1806, *Ward*, the husband, became bankrupt.

CASES IN CHANCERY.

47

7th *January*, 1807, *Ann Atkinson* died, whereupon the bankrupt became entitled, under the settlement, to the interest of the legacy for his life, subject to a deduction of £1200, payable to one *John Leake*, also under the settlement.

1816.
HILL.
v.
ATKINSON,

28th *March*, 1808, an Order was made in the above causes, for sale of so much stock as would be sufficient to pay the £1200, and that the residue should be carried over by the accountant-general to the account of the trusts of the settlement, the interest thereof to be paid to the assignees of *Ward* during his life.

23d *May*, 1808, the Master made his Report; in pursuance of which, £1153, reported due to *John Leake*, in respect of the £1200, was raised out of the stock standing in the accountant-general's name; and the residue, amounting to £3129 stock, was carried over as directed by the order.

In 1809, *Ward's* assignees sold his life-interest in this residue; when an objection was raised by the purchaser on the ground of doubts as to its liability to the legacy duty; in order to obviate which, a petition was presented on the part of the purchaser, whereof notice was given to the Attorney-General and Commissioners of Stamps; and an order obtained thereon, dated the 27th *July*, 1809, by which the report was confirmed, and the interest of the residue directed to be paid to the petitioner "without deduction in respect of the duty imposed by act of parliament, and then payable upon legacies."

18th *February*, 1816, *Ward* (the bankrupt) being dead, *John Leake* became entitled under the settlement to the principal sum of £3129 stock remaining in the accountant-general's name as aforesaid; and by

1816.
HILA
v.
ATKINSON.

an order of this date, made on the petition of the said *John Leake*, it was ordered that the said sum, together with interest accrued and to accrue thereon since the death of the bankrupt, be transferred and paid to the petitioner.

This last-mentioned order was regularly passed and entered, and left with the accountant-general to make the transfer, to which the accountant-general objected, insisting on the receipt for legacy-duty on the original legacy being produced. To this it was answered, that at the time the legacy was paid into the bank by the executors (in 1779), and for more than a year after, no duty was payable in respect of legacies, the first Act imposing a duty on legacies being that of the 20th Geo. 3. (hereafter mentioned); and that the money when so paid in was converted into stock, and transferred into the name of the accountant-general, in trust for the persons entitled under the will of the testator, which was also done before the act passed; and it was submitted that the testator's assets were discharged by such payment.

May 1st, 1816. The accountant-general still objecting, a Motion was made on behalf of the said *John Leake*, for an order that the accountant-general might make the transfer pursuant to the order of the 13th of *February*, and pay to the petitioners all dividends subsequently accrued and to accrue until the time of transfer; which motion was opposed by Mr. *Wetherell* (on the part of the Crown), on the ground that, by the several acts imposing duties in respect of legacies, the fund in court was then liable to the payment of such duty; and, after much argument, the Lord Chancellor desired that the grounds upon which the deduction of such duty was claimed should be brought before the Court by way of petition, that he might have an opportunity of consider-

ing them deliberately, when appearing on what would be a record in the cause.

1816.

HILL

v.

ATKINSON.

In compliance with this direction, a Petition was presented on the part of the Attorney-General and the Commissioners of Stamps, whereby the petitioners claimed the duty of £8 per cent. imposed by the 48th of the King, as having become payable on the legacy of £8,000, after the 10th of October, 1808; Ann Atkinson and Tabitha Leake, to whom the said legacy had been given in succession, being both strangers in blood, and as such chargeable with the same rate of duty. This petition now came on to be heard; and the question was as to the construction of the several Acts of Parliament mentioned in the note below. (a)

(a) The first Act, imposing any duty in respect of legacies, is 20 Geo. 3. c. 28. by which a duty on receipts for legacies is given after the rates therein mentioned; and which rates were increased by two subsequent Acts passed in the 23d and 29th of the King.

36 Geo. 3. c. 52. reciting that "whereas it is expedient that the duties imposed (by the last-mentioned Acts) should be repealed, as to such receipts or discharges for which new duties shall be granted by this Act; and that new duties should be granted in lieu of the duties so repealed," enacts that the said several duties on receipts for legacies be repealed, and that

upon every legacy, &c. given after the passing that Act should be raised and paid the several duties there mentioned; and by the 13th section, it is enacted, "That the duty payable on any legacy given to, or to be enjoyed by, different persons in succession, upon whom the duty shall be chargeable at one and the same rate, shall be deducted and paid by the person or persons having or taking the burthen of the execution of the will or testamentary instrument under which the title thereto shall arise, upon payment or other satisfaction or discharge of every or any part of such legacy to any person or persons to whom the same shall be payable or

1816.

HILL

v.

ATKINSON.

*Wetherell and Heald, in support of the petition.**Sir Arthur Piggott and Parker, contra.*

paid in trust or for the benefit of the persons so entitled in succession; and if the same shall not be paid or satisfied to any such trustee or trustees, then such duty shall be deducted and paid out of the capital of the property so given, upon receipt, by any of the persons so entitled in succession; if any produce of such capital, or any part thereof, according to the amount of the capital of which such produce shall be received;” and that “the persons so chargeable with duty shall be debtors to the King, his heirs and successors, in like manner, and shall be subject to the like penalties, as the executors are hereby made chargeable and subject to.”

The 24th section enacts, that if legatess refuse to accept legacies, duty deducted, the Court, in case of a suit being instituted, may order them to pay costs; and that in suits where the party sued might wish to stop proceedings on payment of legacies, deducting duty, the Court might make order therein.

The 25th section enacts, that if any suit be instituted

concerning administration, the Court shall provide for payment of the duty; and in taking account of any personal estate, &c. shall take care that no allowance shall be made in respect of any legacy, &c. in any manner whatsoever, without due proof of the payment of the duties thereby imposed.”

And by the 26th section, it is provided that executors “may, from time to time, pay, deliver, or otherwise dispose of, any legacy, &c. on payment of such proportions of the duty thereby imposed as should accrue in respect thereof.”

44 Geo. 3. c. 98., reciting that, “the several duties (therein mentioned) are become very numerous and complicated, and it will materially contribute to the public benefit to consolidate the same,” enacts, “that from and after the 10th of October, 1804, all and singular the duties (aforesaid) shall cease and determine,” and imposes the several duties contained in the schedule in lieu thereof; and by the 12th section, after reciting that by the several former Acts “certain

1816.

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HILL.

v.

ATKINSON.

By the former it was contended, that this legacy came within the words of the act (a), "paid, delivered, retained, satisfied, and discharged, *after the*

duties are charged upon receipts or other discharges for or in respect of legacies given by or derived from persons who died previous to the 27th of April, 1796, and that it was expedient to continue the said duties on receipts or discharges for and in respect of such legacies so given or devised as aforesaid, for ten years from the 10th of October, 1804;" it was enacted, "that the said (last-mentioned) duties should remain payable and be paid to and for the use of the King, his heirs and successors, for and during the said term of two years; and that from and after the expiration of the said term, every such receipt or other discharge for or in respect of any legacy given by or derived from any person whatever, whether such person shall have died previous to or since the 27th of April, 1796, shall be, and the same is hereby made subject and liable to the respective duties on receipts and other dis-

charges for legacies" mentioned in the schedule.

48 Geo. 3. c. 149. repealing the duties granted by the last Act, (except arrears, which are to be recoverable by the same ways and means, &c. in all respects, as if this Act had not been made,) enacts that "from and after the 10th of October, 1808, there shall be raised and paid" the several duties specified in the schedule; in which schedule, part 3., is contained the following—
"For every legacy, &c. given by any will or testamentary disposition of any person who died before the 5th of April, 1805, out of his or her personal or moveable estate, and which shall be paid, delivered, retained, satisfied, or discharged, after the 10th of October, 1808," the several duties, after the rates therein specified.

55 Geo. 3. c. 184. repeals those duties, with the same exception of arrears, and imposes new duties in lieu thereof, in the same terms with the former.

(a) 48 Geo. 3. c. 149.

1816.

 Hill
 v.
 ATKINSON.

" 10th of *October*, 1808;" the legacy not being to be considered as "paid, &c." within the meaning of these words, until the transfer of the principal; and they referred to the late decision of the Court of *Exchequer*, in the case of *The Attorney-General v. Lady Louisa Manners*. (a)

On the other side, it was insisted that, admitting the authority of the case in the *Exchequer*, it is not applicable to the present case; because there it was uncertain who would be entitled to the legacy after the death of *Mr. Thomas Manners*, who had the life-interest, and consequently it was never in any manner appropriated till after that event had happened, which was not before 1812. Here, on the contrary, the legacy vested on the death of the testator in 1776, and was actually appropriated in 1779, by the payment into the bank under the decree of this Court, of which the certificate of the accountant-general was produced in evidence, and by its subsequent investment (also previous to the passing of the Act of 20 *Geo. 3.*) in stock upon the trusts above-mentioned.

In reply, it was argued, that the receipt and discharge of the executors, which the acts contemplate as making the payment effectual, must be by the hands of the party receiving.

The LORD CHANCELLOR,

[After stating the circumstances of the case, and observing on the provisions of the several Acts of Parliament cited in the note.]

The executors, by paying in the money under the decree of this Court, effectually divested themselves of

(a) 1 Price, *Exch. Rep.* 411.

the possession of and all control over the legacy in question, which was immediately after laid out in the purchase of stock, upon trusts, which the accountant-general was called upon to declare. Then comes the statute 20 Geo. 3. (1780,) imposing a duty rateably on "*receipts for legacies*," which duty is augmented by two subsequent acts, still following the same description; under which, as was decided in *Green v. Croft (a)*, no duty was payable in cases where a receipt could not be given; and accordingly, *Heath J.* observed, that it was a great error in the legacy acts, that legacies themselves were not chargeable, but only the receipts for them. And the statute of 36 Geo. 3. (27th of April, 1796,) was afterwards passed, expressly to remedy the defect then complained of.

1816.
HILL
v.
ATKINSON.

At the time of the investment of this legacy, *Tabitha Leake* (the person entitled in succession) was under age, and incapable of giving any receipt or discharge. In 1792, she married; her interest in the legacy became the subject of the settlement made on that marriage; and in March, 1808, (*Ann Atkinson* being then dead,) the stock in which it had been invested was transferred under an order of the Court to the trusts of the settlement.

The case of *The Attorney-General v. Lady Louisa Manners*, is an authority, as far as it goes, against the prayer of the present petition; because it would seem that, in that case, if the legacy had been clearly appropriated, the Court would have held the duty not payable. Whether there was an appropriation in that case, or not, is not now to be considered. It was the opinion of the Barons, that an executor, who

1816.

HILL.

v.

ATKINSON.

is also a trustee, shifting a legacy from his hands as executor into his hands as trustee, does not thereby appropriate the legacy; and upon this opinion they acted. But if, where a legacy has been paid into Court under a decree and the trusts are declared accordingly, it is to be said there has been no appropriation, that would be to deny what has never before been called in question.

Then the question is, whether, regard being had to the 25th section of the Act of 36 *Geo.* 3., and to the operation of the other clauses of that statute, it can be said to have been the intention of the legislature, in the 44 *Geo.* 3. (adopting the former,) to make *those* legacies “given by or derived from persons dying previous to the 27th of *April*, 1796,” for which no receipt or discharge could have been given, and which would have been consequently exempt from the payment of duty under the previous statutes, liable to the duties then imposed: and my opinion is, that such is not the true construction.

Upon the whole, I do not think that, either under the construction of the statutes, or upon the authority of the case in the Exchequer, this legacy can be considered not to have been so effectually appropriated in 1779, as to be exempt from the operation of any of the acts.

[The petition was dismissed accordingly; and it was ordered, that the £3,129 Bank Annuities, and £46. 18s. cash in the Bank, with all dividends and interest to accrue previous to the transfer thereby directed, be transferred and paid to *John Leake*, free from the payment of any legacy duty in respect thereof.]

1816.

Dec. 19.

TEMPEST v. ORD.

BY an Order made in this cause, on the 23d of *November*, 1815, it was referred to the Master to appoint a proper person or persons to be manager and receiver or managers and receivers of the collieries in question, and to allow a competent salary for care and pains; such person or persons first giving security, to be approved by the Master, duly to manage the collieries, and annually to account for and pay what should be received in respect of the produce thereof, as the Court should direct.

Under this order, *Mowbray* was appointed manager, and *Gregson* receiver, of these collieries.

Hart and *Bell*, for the Defendant, Lady *Antrim*, now moved that *Mowbray* might be restrained from proceeding in certain buildings begun to be erected by him, and *Gregson* from paying or advancing any sums of money to *Mowbray*, or to any other person, on account thereof, the same having been undertaken without the previous consent or direction of the Court; upon an affidavit, by the Defendant's solicitor, that, being lately at or near the colliery in question, he was informed by *Mowbray* that the building he saw erecting there, was intended as a dwelling-house for the officers belonging to the colliery, the same having been undertaken by *Mowbray* without the previous order of the Court, or consent of the Master, or knowledge of the Defendant; whereupon the Depo-
nent caused warrants to be taken out and served, on the 11th and 13th of *November*, requiring *Mowbray* to produce, in the Master's office, the plan or esti-

Formerly a Receiver was not entitled to any allowance for sums of money laid out by him on the estate without a previous Order. But, according to the present practice, a reference is directed to the Master to enquire whether the transaction is for the benefit of the parties interested.

1816.
 TEMPEST
 v.
 ORD.

mate of such building ; which had not been done. The affidavit further alleged, that the Deponent was informed, and believed that, if a house and offices were necessary, the same might have been formed out of buildings already on the premises, at very little expense.

Leach, for the Plaintiff.

Sir S. Romilly, for the Manager.

The LORD CHANCELLOR said that, formerly, the Court never permitted a receiver to lay out money without a previous order of the Court. But now, where the receiver had laid out money without such previous order, it was usual to refer it to the Master to see if the transaction were beneficial to the parties ; and, if found to be so, the receiver was allowed the money so laid out. (a)

An Order was accordingly made, referring it to the Master to consider and state to the Court whether the buildings then being erected were fit and necessary, and for the benefit of the several persons interested in the collieries : after the master should have made his report, such further order to be made relating thereto as should appear to be just. The present order to be

Reg. Lib. B. 265.

(a) See *Blunt v. Clithrow*, 6 Ves. 799. The *Attorney-General v. Vigor*, 11 Ves. 663. In the latter case, the LORD CHANCELLOR observed, "that the Court is not in the habit of permitting receivers to apply the trust

paid in repairs to any considerable extent without a previous application ;" but directed an enquiry to the Master, on the application of the Receiver to be allowed for repairs done, whether the repairs were reasonable.

without prejudice to any question which Lady *Antrim* might think proper to make to the Court after the Master should have made his Report.



CONST AND BARKER v. BARR.

Dec. 24.

A. contracts with *B.* to purchase an estate, and, after accepting the title, agrees to sell to *C.*, who refuses to complete his purchase on the ground of his having discovered a will made 80 years ago, not set forth in the abstract, but supposed to affect the title. Upon a bill for specific performance by the original vendor against *A.*, who by his answer, (which was put in, and the cause set

THE Bill was for a specific performance, by the Defendant, of an agreement to purchase from the Plaintiffs an estate sold by them as devisees in trust, under the will of *John Sergeant*, deceased; the title to which had been subsequently approved of on the part of the purchaser, and the conveyance prepared and engrossed. The answer admitted the agreement to purchase, and the acceptance of title; but insisted on a false description in the particulars of sale. The cause was set down for hearing, on bill and answer, in Easter term, 1816; but before it came on to be heard, a motion was made on the part of the Defendant, that he might be at liberty to file a supplementary answer by reason of discovering the will of one *Mary Sibley*, relating to the title to the premises, since putting in his former answer.

This application was supported by affidavit of the Defendant's solicitor, stating the following circumstances:—Previous to the preparing of the conveyance, the Deponent called on the Plaintiff's solicitor for the purpose of comparing the abstract with the original title-deeds; when, the first deeds mentioned in the abstract being indentures of lease and release,

down for hearing, before this discovery was made,) admitted the title; *quære* if he may be allowed to set up the will as an objection to the title by a supplemental answer.

By consent of both parties, a reference was directed to the Master to enquire whether a good title could be made, regard being had to the will only.

1816.

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CONST.

v.
BARR.

of the 1st and 2d of *August*, 1726, in which £100 was mentioned as the consideration for the absolute conveyance of the estate in question, the Deponent expressed his surprise at the inadequacy of price; but, being assured that the title was good, and had been approved by an eminent conveyancer, gave up the objection.

On the 29th of *September*, 1815, (after the cause had been set down,) the Defendant contracted to sell this estate (together with certain lands of the Defendant's own) to one *Smith*, whose solicitor was furnished by the Deponent (as solicitor for the Defendant) with a copy of the same abstract. On the 7th of *July*, 1816, *Smith's* solicitor called on the Deponent to inspect the deeds relating to the Defendant's own lands; and the Deponent, at his request, applied to the Plaintiff's solicitor that he might have liberty to inspect the deeds relating to the estate in question, but was refused permission. Afterwards, on the 20th of the same month, *Smith's* solicitor informed the Deponent that he had found the will of *Mary Sibley*, at *Doctors' Commons*, from which it appeared that a good title could not be made to the estate; the will containing a devise to certain persons, upon trust, "to stand seised for the benefit of my son, *John Sibley*, for life, and after his death for the issue of his body, and the heirs of such issue if they attain 24; and for want of such issue, for the use of my son, *Hodges Sibley* for life," with like remainders; "and for want of issue of both, then to my daughter, *Elizabeth Dawson*, in fee." And the question was, whether, under this will, *Hodges Sibley* took an estate tail or for life only.

The affidavit further stated, that *Smith*, being advised that *Hodges Sibley* took only a life-estate under

the will, and that the title was, therefore, imperfect, had refused to complete his contract, and threatened to bring an action to recover back his deposit.

1816.

 CONST.
 v.
 BARR.

On the other side, the circumstances of the title were relied upon; the will being upwards of 80 years old, subsequent to which a fine had been levied by all the granting parties to the deed of 1726, one of whom was the said *Hodges Sibley*, (therein stated to be the son of *Mary Sibley*, deceased,) and another of whom was *Elizabeth Dawson*, the reversioner in fee, to whom the estate was subsequently mortgaged, and who afterwards joined in a conveyance to the parties from whom the Testator (*Sergeant*) derived his title. It was contended, that this title was such as a purchaser is bound to accept; but that, if not, the present purchaser had precluded himself from objecting, by the acts of his solicitor, who, by the letters in which he made the application for liberty to *Smith's* solicitor to inspect the title-deeds, had stated, that his client was then ready to complete his purchase; that no objection taken by the solicitor of a second purchaser ought to prevail against such an acceptance; besides, that it was not shown either that the testatrix, *Mary Sibley*, was owner of the estate devised by her, or that that estate was the same which was the subject of the present dispute. And it was further insisted, that the objection was raised only for the purpose of delay; and that the motion, if granted, ought at least to be on the terms of the Defendant paying his purchase-money into Court, and making an affidavit that the title was actually impeached by the matter of the subsequent discovery.

On the part of the Plaintiffs, it was denied that their conduct had afforded any ground for the imputation of delay; and it was observed, that the matter

1816.


 COURT.

v.

DARR.

of objection could not have been sooner discovered, inasmuch as the will of *Mary Sibley* was not stated in the abstract delivered.

Sir *S. Romilly*, in support of the motion.

Hart and Roupell, contra.

The LORD CHANCELLOR observed, that the case was a very peculiar one, and took home the papers to consider of the application; but afterwards an Order was made, by consent of both parties, whereby "the Defendant having accepted the title before it was known that the will of *Mary Sibley* existed," it was referred to the Master "to consider and state to the Court whether a good title could be made, having regard only to such objections as might arise out of the will of *Mary Sibley*, and the circumstances arising upon the consideration of the same;" and "upon the like consent" it was ordered that, "after the Master should have made his Report, the parties were at liberty to apply by motion or petition for further directions, and with respect to costs," as they should be advised. (a)

(a) Reg. Lib. A. fo. 295.

HANNAM v. THE SOUTH LONDON WATER-
WORKS COMPANY, and JOSEPH SHEE. Dec. 11—24.

THE Bill (a), praying an Injunction to restrain the first named Defendants from proceeding in Ejectment for a breach of Covenant to repair, was filed on the 22d of *February* 1814, and the Defendants put in their Answer on the 11th of *March* following. On the 16th of *July*, 1814, an Order was made, by which the Court declared, "that, attending to the treaties
"for the purchase of the respective interests of the
"Plaintiff and Defendants in the premises, and to
"the provisions of a certain Act of Parliament
"therein mentioned, as they might affect those pre-
"mises, and also to the possibility of the effect
"which the powers of the *Vauxhall Bridge Company*
"must have upon the Plaintiff's strictly performing
"all the covenants in his Lease, it was reasonable
"that the Injunction should be granted: and there-
"fore, upon payment by the Plaintiff to the Defend-
"ants of their costs at law, it was agreed that an
"Injunction should be awarded to restrain the Defend-
"ants (*The South London Water Works Company*)
"from further proceeding in their Action of Ejectment,
"until the hearing or further Order; the Plaintiff
"paying his rent for the premises from time to time
"as it became due, and understanding to obey such
"Orders as the Court should think proper to make
"upon any applications by the Defendants, requir-
"ing him to repair or rebuild any part of the pre-
"mises, and also to obey such Orders as the Court
"should make upon any applications by the Defend-
"ants, in case it should be made to appear that the

Order to dis-
miss for want of
prosecution,
after the regu-
lar time elapsed,
and an Injunc-
tion having is-
sued on the
merits, not to
be discharged
for irregularity,
although ob-
tained upon
motion by the
Defendant
without notice.

(a) See Note at the end of the Case.

1816.

HANNAM

v.

SOUTH LONDON
WATERWORKS
COMPANY.

“ Defendants, in any treaty which they might con-
 “ clude with the *Vauxhall Bridge Company* for their
 “ interest in the premises as Lessors, had been rea-
 “ sonably required to accept a less price for such in-
 “ terest, than they would have obtained if the pre-
 “ mises had been by repairs or re-building, kept in
 “ or restored to the state and condition required by
 “ the Lease.” (a)

This Order was passed and entered; but no Injunction issued in consequence, and no further proceedings were had in the Cause, until the 18th of *November*, 1816, when, upon motion by the Defendants, *without notice*, and upon production of the Six Clerks’ certificate of the date of the Bill filed, the usual order was made to dismiss the bill for want of prosecution.


On the 22d of *November*, notice was given by the Plaintiff of a motion to discharge the Order of the 18th of *November* for irregularity; which motion now came on to be heard.

Hart and *Wilbraham*, in support of the Motion, relied upon the established courtesy of the Office, and on the Injunction being still in force.

Sir *Arthur Piggott*, *Leach*, and *Bickersteth* for the Defendants, referred to *Day v. Shee* (b), as having settled the practice with respect to this particular question, and to the case of *Bliss v. Collins* (c), where the

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| (a) Reg: Lib. A. fo. | v. <i>Purnell</i> , 16 Ves. 204. <i>Attorney-General v. Finch</i> , 1 Ves. & |
| (b) 3 Ves. & B. 170. | B. 368. <i>Morris v. Owen</i> , 1 Ves. & |
| (c) Dec. 5. 1815. Reg. lib: | & B. 523. <i>Faller v. Willis</i> |
| A. fo. 92. See also <i>Degraves v.</i> | 3 Ves. & B. 1. <i>Bellingham</i> |
| <i>Lane</i> , 15 Ves: 291. <i>Naylor v.</i> | v. <i>Bruty</i> , 1 Madd. 265. |
| <i>Taylor</i> , 16 Ves: 127. <i>Jackson</i> | |

Lord Chancellor held, that an Injunction obtained on the merits made no difference; and that, when the bill is dismissed, the Injunction, whether common or special falls together with it.

1816:

 HANNAM
 v.
 SOUTH LONDON
 WATERWORKS
 COMPANY.

The LORD CHANCELLOR

Refused the Motion with costs. (a)

On the refusal of *this* Motion, the solicitor for the Defendants caused a writ of *Habere facias possessionem* to be issued on the Ejectment, and which was executed on the 12th of *December*. On the 13th, the Master taxed the cost, and a Subpœna was taken out against the Plaintiff, to enforce payment.

The Plaintiff now moved, that the Order of the 18th of *November* might be discharged, and the Bill retained, on payment to the Defendant of the costs of obtaining the Order, and of the present application, in case the Court should think proper to allow the same; and that the Defendants might deliver up to Plaintiff, or as he should direct, possession of the premises which they had obtained under the proceedings in the action of Ejectment, since obtaining the order to dismiss. This motion was supported by affidavit, accounting for the delay in prosecuting the Cause, by the circumstance that the Plaintiff had parted with his interest in the premises by private contract to the *Vauxhall Bridge Company*, in Feb-

11 Dec. 1816.

It is not the ordinary practice to restore a bill which has been regularly dismissed for want of prosecution; but this may be done under the circumstances of the case.

The refusal of a motion to discharge an

order to dismiss, does not constitute a ground to prevent the party from applying to have the bill restored.

A bill which has been regularly dismissed will not be restored for the mere purpose of agitating the question of costs.

(a) Reg. Lib. A. fo. 110.

1816.

HANNAN

SOUTH LONDON
WATERWORKS
COMPANY.

uary 1815, and being informed that the Defendants had also sold their interest, thought the matters in dispute were terminated.

Hart and Wilbraham, in support of the Motion.

Sir *Arthur Piggott, Leach*, and *Bickersteth*, opposed it on the ground, *first*, That the Plaintiff was too late in his application to have the bill retained after the writ of possession was executed; *secondly*, that proceedings having taken place under the order of dismissal, by taxing the costs and issuing a subpoena, the only course now left for the Plaintiff was to file a new bill.

The LORD CHANCELLOR :

It is not the ordinary course to restore a bill which has been dismissed for want of prosecution, on payment of costs. But there may be cases in which substantial justice requires that this shall be done; and then, upon the particular circumstances, the Court will make the order. The fact of this cause not having been proceeded in for more than two years, may tell both ways; for it affords some evidence of the Defendants having acquiesced in the delay; but there was nothing to prevent the order for dismissal from being obtained on a mere motion of course. Then the refusal of the former motion to discharge that order for irregularity is no reason against the present application. But the circumstances under which it is made are against the bill being restored. The order for the Injunction goes a great way to shew what the Court then thought upon the merits of the case, from the very special terms upon which it was granted. All the stipulations made in that order were for the benefit of the Plaintiff, and did not enable him to dispense with the observance of the strict rules of the Court, provided he chose to keep his In-

junction alive. But in this case it is evident that complete justice cannot be done on the bill which has been dismissed. The *Vauxhall Bridge Company* must be made parties, if the cause goes on; and thus there is nothing in dispute between the present parties, but the costs of the suit. But there is no instance to be found in which this Court has restored a bill which has been regularly dismissed for the mere purpose of agitating the question of costs. In the present case, I can do nothing without first restoring the bill; but, in refusing to do that for the mere purpose of costs, I must not be understood as saying that a bill may not be restored after it has been dismissed for want of prosecution. In consequence of the mistakes on both sides, I shall not refuse this motion with costs; and the Defendants must restore possession of the premises.

1816.

 HANNAM
 v.
 SOUTH LONDON
 WATERWORKS
 COMPANY.

¶ [Reg. Lib. A. fo. 257. Whereupon, &c. and upon the Defendants, (the Company, &c.) undertaking to deliver possession of the premises, and to give quiet enjoyment thereof to the Plaintiff, His Lordship doth not think fit to make any order on the present application.] (a)

(a) The material circumstances of the case and of the proceedings previous to the Order for an Injunction, so far as I have been able to collect them from the papers with which I have been furnished, appear to be the following.

The Bill stated that the Plaintiff, being tenant of the premises in question under a lease from the former owner containing a covenant for perpetual renewal, surrendered the same in *February*, 1810, to the Defendants (the *Waterworks Com-*

Remedy by Injunction to restrain an action on breach of covenant to

repair, on the peculiar circumstances of the case, not amounting to neglect or surprise, and there having been no waiver or abandonment on the part of the Defendant.

1816.



HANNAM

v.

**SOUTHLONDON
WATERWORKS
COMPANY.**

pany), who were the owners, and took a new lease from them for twenty-one years, at £5 per cent. with a covenant to keep in repair, and a proviso that if not repaired within three months after reasonable notice, the lease should be void. That, on the 28th of May, 1813, the *Vauxhall Bridge Company*, by virtue of an act of parliament, enabling them to take possession of certain buildings, (of which these premises formed a part,) for the purposes of that act, on the terms therein mentioned, gave notice to the Plaintiff to quit and deliver up possession, upon which a treaty being set a-foot respecting the terms of compensation, was concluded on the 16th of June following, at the sum of £4000, the price demanded by the Plaintiff. That in August following, a fire broke out on the premises, which had then been sub-demised by the Plaintiff subject to the covenants of his original lease. That on the 14th of that month the Defendants (the *Waterworks Company*) sent notice to the Plaintiff to repair. That on the 1st of September, at a meeting of the *Vauxhall Bridge Committee*, the Plaintiff's solicitor presented the notice, and was informed by the Defendant *Shee*, (who was Chairman both of that Committee and of the Committee of the *Waterworks Company*), that he need not trouble himself, by reason of a treaty then on foot between the two companies. The bill then charged that this treaty was set on foot with notice to the Defendants (the *Waterworks Company*), of the treaty between the Plaintiff and the *Vauxhall Bridge Company*; but that the treaty between the Companies having been broken off, the latter Company refused to complete their contract with the Plaintiff, which he was advised he had not the means of enforcing, and was accordingly about to repair the premises, when the Defendant brought Ejectment on the breach of covenant, insisting that all these proceedings amounted to a waiver of the notice to repair, and praying that it might be declared accordingly.

On motion for an Injunction, 26th May, 1814, *Wallcraft* for the Plaintiff contended, first, that the Company were bound by the dealings between the Plaintiff and *Shee* who was their agent; and secondly, that, even if not so bound, the Court would relieve against the breach of covenant, by Injunction;

if not upon general principle, yet in respect of the magnitude of the Plaintiff's interest in the premises.

The following cases were cited, *Webber v. Smith* (a), *Wadman v. Calcraft* (b), *Sanders v. Pope* (c), *Hill v. Barclay* (d), *Alcock v. Jeudwine* (e), *Pym v. Blackburn* (f), *Mosely v. Virgin* (g).

1816.
HANNAM
v.
SOUTH LONDON
WATERWORKS
COMPANY.

The LORD CHANCELLOR said, that in general this Court will not relieve against the breach of a covenant to repair, but that it may do so under certain circumstances. That the circumstances of the present case were very peculiar; what was insisted on by the Defendants (the *Waterworks Company*) being that their tenant should repair certain premises pending a treaty with a third party, in the result of which, (if completed,) those premises would immediately afterwards be pulled down. That he should be strongly inclined to grant an Injunction in such a case, if properly made out; but that here the Plaintiff had rested his equity on a ground that must fail him; what passed between himself and *Shee* not amounting to a waiver on the part of the other Defendants, as *Shee*, in this transaction, acted not for the Defendants, but for the *Vauxhall Company*. That the present case could not, therefore, be decided on any of the grounds which had been proceeded upon in former cases; such as neglect, surprise, or fraud; the only question being, how far the rights of the parties had been so affected by an act of the legislature, as to call for the interference of the Court in the manner sought.

His Lordship directed that execution should be stayed till farther order, with a view to see if the parties could come to an agreement; and, on the matter being again brought before him, made the order of the 16th of July, mentioned in the text.

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| (a) 2 Vern. 103. | 1 Eq. | (f) 3 Ves. 184. |
| Ab. 115. | | (g) 3 Ves. 184: And see |
| (b) 10 Ves. 67. | | <i>Bracebridge v. Buckley</i> , 2 |
| (c) 12 Ves. 282. | | Price 200. <i>White v. Warner</i> , |
| (d) 16 Ves. 402. | | <i>April 22d, 1817, post.</i> |
| (e) 23d March 1813. | | |

1816.



Nov. 20.

FORREST v. ELWES.

Manager of a
West-India
estate, although
not entitled
during his ab-
sence from the
island to charge
commission, yet
is entitled to be
allowed all such
sums as he has
reasonably paid
to others to
whom he has
intrusted the
management.

THIS was an Exception taken by the Manager and Consignee, appointed by the Court, of an estate in the island of *Jamaica*, to the Master's Report, for not allowing him the sum of £742 6s. 2d. currency, mentioned in the Report. The Master had certified the amount of "the payments and disbursements" made by the exceptant on account of the estate for the year 1810, "including £742 6s. 2d. charged by him as paid to Messrs. *Smith* and *Lawson*, for commission on the produce thereof sold on the island and shipped to *England*;" but, with respect to which sum of £742 6s. 2d. so charged, the Master reported, that he "had not allowed the same by reason of the said *David Murray* (the manager) not being personally resident in the said island during any part of the year in which such consignments were made." The Master proceeded to state an affidavit which had been laid before him by the said *David Murray*, alleging, that the Deponent, being about to leave the island in *June*, 1809, and conceiving it a duty incumbent on him, as such Manager, to appoint a proper person in the island to manage the estate during his absence, appointed the said Messrs. *Smith* and *Lawson*, "being persons in his judgment of respectable characters, and perfectly understanding the best mode of conducting the concerns of the said estate;" that he had not made any reservation of any part of the usual commission paid in *Jamaica* for transacting business of the like nature, nor any other emolument or profit relating thereto, and that the several sums charged in his accounts, for commission, had been paid to or retained by the said Messrs. *Smith* and *Lawson*, for their own

use, no part thereof being in any manner paid or accounted for, or intended to be paid or accounted for, to the Deponent. Wherefore it appeared to the Master " that the said sum of £742 6s. 2d. had been actually paid to or retained by the said Messrs. *Smith* and *Lawson*, and that the said *David Murray* had received no benefit or advantage therefrom, and it did not appear that the estate had sustained any loss or injury by his having deputed the said Messrs. *Smith* and *Lawson* to act for him in the management of the estate during his absence; but nevertheless the Master conceived that, by reason of the personal absence of the Manager during the whole of the said year, he ought not to allow the charge of commission without the special direction of the Court."

1816.

FORREST
 v.
ELWES.

Sir S. Romilly and *Pepys*, in support of the Exception.

Martin and *Trower*, for the Master's Report, stated the question to be whether this case fell within the principle of *Chambers v. Goldwin* (a); and contended that the commission, being an allowance made for personal care and trouble, ought to cease during the Manager's absence.

The LORD CHANCELLOR :

Although persons entitled to commission must be resident in the island, and personally acting in the absence of the owner, yet, it would be too much, and in fact would be laying down a very injurious principle; to say that, in no case where the manager himself is absent, commission ought to be allowed. In *Chambers v. Goldwin* (b), I held that the Mortgagees

(a) 5 Ves. 834. 9 Ves. 264. (b) 9 Ves. 270, 273.

1816.

 FORREST
 v.
 ELVES.

was entitled to be allowed all the sums which he had actually paid to others whom he had intrusted with the management during his absence ; and though in that case the actual payments, and consequently the allowances, fell short of the amount of the commission charged, and a Manager has no right to be paid his commission, as commission, during his absence, yet I think he is entitled to what he has really paid to others for the management of the estate, provided the payments be in themselves reasonable, as to which if it is disputed, there must be an enquiry.

[Exception allowed.]

Reg. Lib. A. 352, where take in the name of " For-
 the cause is entered by mis- rest v. Harvey."

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ROLLS.

Nov. 30.

Devise to A. and B. " between them." These words constitute a tenancy in common.

LASHBROOK v. COCK and Others.

JOHN MARTIN, by his Will, dated the 13th of February, 1748, gave to his two daughters, *Jane* and *Mary*, " all his right in B. and C. between them."

After the Testator's decease, the two daughters entered into possession, and received the rents and profits, in equal moieties, till the death of *Jane*, in 1792, after which *Mary* entered into possession of the whole estate.

On a Bill by the husband of *Jane*, claiming as tenant by the curtesy, to be entitled to a moiety of the estate and of the rents and profits since the death of his wife, The MASTER of the ROLLS held the Plaintiff entitled, the word " between" constituting a tenancy in common ; and decreed accordingly.

1816.

MARQUIS CHOLMONDELEY and **The Hon.**
ANN SEYMOUR DAMER PLAINTIFFS;
 AND
LORD CLINTON DEFENDANT.

Novi 21.
Dec. 18.

UPON the refusal of the motion to amend their Bill by striking out the relief (*a*), the Plaintiffs filed a new Bill for discovery only, to which the Defendant put in a Plea in bar, stating that *George Earl of Orford* made a Codicil to his Will, dated the 4th of *December*, 1776, whereby, after subjecting his real estates to the payment of his debts and legacies, he devised the same to be sold for effectuating the payment thereof, and thereby accordingly directed and empowered Sir *H. P.* and four others therein named, as soon as conveniently might be after his decease, to sell and dispose of the same, or such parts as they should judge necessary for the purpose aforesaid; and by and out of the monies arising from such sale, to pay the same; and that the said *George Earl of Orford* died without having revoked or altered the said Codicil.

On a Plea to a Bill of Discovery, the Vice-Chancellor being of opinion that a *Cestuy que trust* could not file such a Bill without the Trustee, in whom the legal estate was vested, directed a case for the opinion of a Court of Law on the question where the legal estate actually was, and ordered the Plea to stand over till the return of the Judge's certificate.

The parties not being able to

This Plea coming on to be argued before the *Vice-Chancellor* on the 29th of *March*, 1814, was overruled as being insufficient in point of form; but the Defendant having obtained an order that he might be at liberty to amend (*b*), the Plea was afterwards amended accordingly, by introducing the facts, that Sir *H.*

agree on the case, a Motion for leave to amend the Bill by adding the Trustee as a Plaintiff, pending the Vice-Chancellor's order, refused.

(*a*) 2 Ves. & B. 113.

(*b*) 7 April 1814. Reg.

Lib. A. fo. 555.

1816.

CHOLMONDE-

LEY.

v.

CLINTON.

P. died in the Testator's life-time, and that the other four persons named in the Codicil, survived the Testator; *averring* " that they became and were, under " and by virtue of the said Codicil, seised in fee-sim-
" ple of all the said Testator's real estates."


On the 11th and 13th *May*, 1814, the amended Plea was argued before the *Vice-Chancellor*, who afterwards ordered (*b*), that a Case should be sent to the Court of King's Bench upon the question, whether the four surviving Trustees were, under the Codicil, seised in fee-simple of the real estates of which the Testator was so seised at the date of his Codicil; such Case to be settled by the Master if the parties differed; and it was ordered that the Matter of the Plea should stand over until the return of the Certificate.

Some proceedings were had under this order, for the purpose of settling a Case before the Master; but before any case could be settled, the Plaintiffs moved that they might be at liberty to amend their Bill by adding the surviving Trustees under the Codicil, as Plaintiffs.

Sir *A. Piggott*, *Leach*, *Roupell*, and *Shadwell*, in support of the Motion.

The objection made by the Plea is merely in point of form, that the present Plaintiffs are *Cestuy que* trusts only, and that it is necessary to have the Trustees before the Court as parties to the suit. In answer to this, it is doubted, first whether the legal estate is vested in these trustees, or whether the Codicil gives them any thing more than a mere naked power to sell in aid of the personal estate; secondly, whether, admit-

ting that they have the legal estate, it is necessary that they should be made parties to a suit on a mere Bill of discovery in support of ejectment. On the latter point the *Vice-Chancellor* was of opinion, that a *Cestuy que* trust could not file such a Bill without the Trustee in whom the legal estate is vested, but, on the former not being able to satisfy himself whether the Codicil amount to a devise of the real estate or contained only a mere authority to sell, he directed a case to be sent for the opinion of a Court of Law, and that the plea should await the result of that opinion. If the plea should ultimately be allowed, therefore, it amounts to no more, than that the Bill, in its present form, is defective for want of parties; and what the Plaintiff now seeks is to have liberty to amend by adding the parties supposed to be wanting, and to put an end to the question.

1816.

 CHOLMOND-
 LEY.
 v.
 CLINTON.

Sir *Samuel Romilly*, *Bell*, and *Heald*, for the Defendant.

Such an application as the present is wholly unprecedented — that, pending a Plea, the Plaintiff, in a Bill of discovery should have liberty to amend by adding parties, when there is a statement on oath, which, if true, will render it impossible for the Plaintiffs to proceed with their Action at Law, and consequently make the discovery sought altogether useless. The proper course, if they proceed at all, is to let the Plea be allowed; after which they may amend as they please, but not by adding parties as Plaintiffs which can never be allowed to a Bill of discovery, whatever may be the case where the Bill seeks relief. The Ejectment is not brought in the name of the Trustees; and there is often not a more difficult case in a Court of Equity than to determine when a person may be at liberty to avail himself of the outstanding legal estate of another,

1816.

CHOLMONDE-

LEY

v.

CLINTON.

The LORD CHANCELLOR :

Independent of the point of form, the difficulty of the case is this. The Plaintiff has filed a Bill for a discovery in aid of his action of Ejectment. The Plea to this bill is, you have not the legal estate, and therefore cannot maintain your action. The Codicil is set up in bar to the discovery sought. Now I am bound to take it, as the *Vice-Chancellor's* opinion, that if the Court of Law to which this case has been sent, shall hold that the estates were well devised by the codicil, the Plea is good. Then you come here for leave to amend your bill, notwithstanding that Plea is still pending. But what am I to do with the *Vice-Chancellor's* order? That must be discharged in the first instance. With regard to the question of form, I would ask whether any authority can be produced in which the Court has allowed a Bill of discovery to be amended, by adding parties as Plaintiffs? I will not make a precedent for which there is no foundation in the principles or practice of the Court.

No instance of a Bill of Discovery being allowed to be amended by adding parties as Plaintiffs.

On the following day, *Shadwell* mentioned, in support of the Application, the cases of *Hudson v. Fletcher (a)*, and *Gurish v. Donovan. (b)*

But the LORD CHANCELLOR held, they did not apply, because they were not cases of Bills, for discovery there, and refused the Motion.

(a) Finch, 114.

(b) 2 Atk. 166, And see

2 Ves. & B. 114, note ; where

this case is stated from the Register's Book.

The Plaintiff now moved that the *Vice-Chancellor's* Order of the 26th of *May*, 1814, might be discharged, and the Plea withdrawn on payment by the Plaintiffs the costs of such Order and Plea; and that the Plaintiffs might be at liberty to amend their Bill by introducing therein the Codicil of the 4th of *December*, 1776, and the fact that there is a count in the Declaration in Ejectment on the demise of the Trustees named in the Codicil, and such other amendments as may be consequential thereon.

1816:
CHOLMONDE-
LEY
v.
CLINTON.

This motion also was opposed; but at last, on the Plaintiffs' consenting that the Plea should be allowed, and moving to amend as above, an Order was made accordingly.

Reg. Lib. A. 691. b.



BREWSTER and Others v. CLARKE and Others. Dec. 24,

THE Bill was for the specific performance of an agreement to purchase a ship, of which the Plaintiffs were part-owners. The ship had been put up to sale by public auction, at which the Defendant *Clarke* having agreed to become the purchaser, paid the deposit, and executed a memorandum of sale, reciting that the ship had been duly registered, *a copy of the certificate of registry being thereto annexed*. The answer, admitting

Agreement for sale of a ship void under the Registry Acts, 26 Geo. 3, c. 60, and 34 Geo. 3. c. 68, for want of the certificate of

registry being duly recited in the memorandum of sale, although a copy of such certificate was thereto annexed,

The Policy of these Acts prevents a Court from looking on one who has not strictly complied with their provisions in the light of a purchaser.

1816.

BREWSTER

v.

CLARKE.

ting that the Defendant was in possession under this agreement, raised objections to the title, and submitted that the sale was void by reason of the certificate of registry not being duly recited in the memorandum of sale, according to the provisions of the Act 34 Geo. 3. c. 68. s. 14. enacting that "no transfer or agreement for transfer of property in any ship or vessel shall be valid or effectual *unless made by bill of sale or instrument in writing containing such recital*," as prescribed by the former Act 26 Geo. 3. c. 60. s. 17. by which last-mentioned Act it is provided that "*the certificate of registry shall be truly and accurately recited in words at length* in the Bill or other instrument of sale thereof."

Horne, for the Plaintiffs, moved, on the admission in the answer, that the residue of the purchase-money might be paid into Court; but was stopped by the LORD CHANCELLOR, who said, the difficulty was, whether the Acts of Parliament did not absolutely prohibit a Court, either of Law or Equity, to entertain such an application on the part of any the persons interested; and whether, by the policy of those Acts (a), he was not precluded from looking on the Defendant in the light of a purchaser.

Agar and *Merivale*, for the Defendant.

The motion stood over, with liberty for the Plaintiff to look into and examine the acts; and, upon its being mentioned again some weeks after, His Lordship refused the motion.

(a) See the observations of the Lord Chancellor and the Master of the Rolls, in *Mestaer v. Gillespie*, 11 Ves. 625. 642. See also *Speldt v. Lechmere*, 13 Ves. 588. Ex. p. *Yallop*, 16 Ves. 60. *Thompson v. Smith*, 1 Madd. 399. and cases referred to in note, p. 400.

1816.

HALY v. GOODSON and Another.

Dec. 13. 24:

THE Plaintiff, claiming to be entitled as part-owner with the Defendants, in equal shares, prayed an account of the ship's dealings and transactions on three successive voyages, and to be paid one-third part of the clear earnings, together with the amount of what was due to him for wages and disbursements, as master, after deducting certain monies advanced by the Defendant *Goodson* towards his share of the expenses of building and fitting out; and, alleging that the said Defendant (who was the ship's husband) intended, contrary to his wishes, to send the ship on a new voyage without coming to account, and to receive the future earnings and apply the same to his own use; and that the other Defendant refused to join in this application, prayed an injunction to restrain the sailing without his consent.

The Court of Admiralty is open all the year round to applications by part-owners to restrain the sailing of ships without their consent, until security given to the amount of the respective shares. But where the shares are not ascertained, that Court has no jurisdiction; and, in such case the Court of Chancery will exercise a concurrent jurisdiction, by injunction, to restrain the sailing of a ship until the share of the party complaining shall be ascer-

The Defendant *Goodson*, insisting that by virtue of an agreement made subsequent to the original contract between the parties, the Plaintiff was entitled as owner only in one-fourth, not in one-third share, of the profits of the ship, admitted the intention to send the ship on a new voyage, without the Plaintiff's consent, in case he refused it; the other Defendant alleging that he concurred in such intention; and both the Defendants submitting that the ship ought not to remain unemployed by reason of the accounts of the former voyages not being fully settled; and that, in case the Plaintiff did not approve of the

tained, and security given to the amount of it. In this case, it was referred to the Master to make the enquiry, and to settle the security accordingly.

1816.


 HALY

v.

GOODSON.

voyage intended, he might obtain security for his share, by applying in the usual manner to the Court of Admiralty.

On an application made by the Plaintiff *ex parte*, the *Vice-Chancellor* had granted an Injunction to restrain the sailing of the ship without the Plaintiff's consent, until security should be given to the Plaintiff for his alleged share thereof, and until answer or further order.

On the coming in of the answers, a motion was now made to dissolve that Injunction.

Bell and *Duckworth*, in support of the motion, contended that the application ought to have been made to the Court of Admiralty, as the only Court having competent jurisdiction, and cited Anon 2 Cha. Ca. 36. *Boson v. Sandford* (a), *Strelly v. Winson* (b), and *Abbott on Shipping*, 76, 77.

Sir *S. Romilly* and *Roupell*, *contra*, contended that where there is any question between the parties upon which this Court has a clear jurisdiction, as, in the present case, with respect to the share to which the Plaintiff is entitled under the agreement between the parties, it will assume a concurrent jurisdiction with the Court of Admiralty, as incidental to that question, by restraining the sailing of the ship without security given to the dissentient part-owner for the amount of his interest. In *Horn v. Gilpin* (c), it is stated, that the true ground of decision in the case of *Strelly v. Winson* was, not that the party had not

(a) Carth. 63.

(c) Amb. 255.

(b) 1 Vern. 297. Skin.
230.

appealed to the Court of Admiralty, but that the part-owner who complained had not expressly notified his dissent; and this accords with the Report in *Skenner*.

1818.
HALY
v.
GOOSEW.

The LORD CHANCELLOR,

This is an important question, involving somewhat more than the mere point of form. I cannot divest myself of the jurisdiction which is claimed to be exercised in the Plaintiff's behalf, or refuse to assume a concurrent jurisdiction in that respect with the Court of Admiralty, until I am informed, both whether that Court is competent to decide upon a question of disputed title, and also whether it is always open, in the vacation as well as in term-time, to listen to applications of this nature; for, if it be not, it would be great injustice to refuse the interference of this Court, which is constantly open for the purpose of granting injunctions.

The LORD CHANCELLOR,

I am of opinion that the Injunction ought to be continued, until security given. Upon the result of the enquiries I have caused to be made, it appears that the Court of Admiralty is open all the year round to applications of this nature by part-owners of ships, and also that it has jurisdiction to take an account and order security to be given on the footing of the respective shares, when the amount of those shares is apparent. But where the shares are uncertain, and their respective amount, which is a matter of covenant and contract between the parties, is the subject of dispute, then, if the Court of Admiralty were to proceed, I apprehend it would render itself liable to a prohibition. Upon that ground it is,

Dec. 24.

1816.
HALY
v.
GOODSON.

therefore, that this Court ought to interfere on the present occasion. The amount of the share for which security is to be given must be ascertained by reference to the Master.

The following minutes were drawn up accordingly.

“ Refer it to the Master to enquire what interest or share the Plaintiff is entitled to in the ship ; and let the Defendants give such security as the said Master shall approve, for the interest or share he shall so find that the Plaintiff is entitled to ; with liberty for the Defendants to propose themselves as such security. And, upon such security being given, let the injunction be dissolved.”

1816.

MARQUIS CHOLMONDELEY and The Hon. Dec. 18. 20. 24.
ANN SEYMOUR DAMER v. LORD CLINTON, SIR LAWRENCE PALK, and Others.

HART (for the Defendants, Sir Lawrence Palk, Lady E. Palk, Lord Shaftesbury, and Sir Thomas Tyrwhitt,) moved, that the depositions of the witnesses examined on behalf of the Plaintiffs might be suppressed, as far as concerned his clients. The Replication was filed to Sir Lawrence Palk's answer on the 4th of February, 1814. Eight witnesses were examined on behalf of the Plaintiffs in the months of April, May, and June, 1814. The solicitors for Sir L. Palk, by affidavit, stated that they had no notice whatever that any witnesses had been examined, until 5th December instant, when one of them (Mr. G. T. Lambert) learnt accidentally that such was the case. The agent or acting clerk of Mr. Smith (the clerk in court for Sir L. Palk, &c.) deposed, that he had examined the memorandum book of business done by Smith, his clerks and agents, from the 4th of February, 1814, to the 10th of December, 1816, and he found no entry of any witnesses in this cause having been produced

Depositions taken on the part of the Plaintiff having been suppressed, as against some of the Defendants, on the ground of no notice until after publication; upon evidence that the omission arose from a mistake committed by the clerk to the Plaintiff's solicitor, in giving at the Examiner's office, the name of the

clerk in Court for others of the Defendants, as the name of the clerk in Court for all the Defendants, in consequence of which the Plaintiff's witnesses were produced only at the seat of the clerk in Court so named; and upon the Examiner's certificate that the name of that clerk in Court only was delivered to him; the Lord Chancellor gave to the Defendants the option, either of permitting the Plaintiff to re-examine the same witnesses, or of allowing the depositions to stand, with liberty for them to cross-examine these witnesses, and to examine others.

The Court will exercise the right of rectifying a mere slip in any of its proceedings.

1816.

CHOLMONDE-

LEY

v:


CLINTON

and others.


at the seat of *Smith* in the Six Clerks' Office prior to their examination by the examiner, and therefore, (to the best of his knowledge, remembrance, information, and belief,) no person or persons was or were produced as witness or witnesses for any of the parties in this cause at the seat of *Smith*. He further deposed, that (to the best of his knowledge, remembrance, and belief,) he never had any notice or information of the examination of witnesses in this cause on behalf of the Plaintiffs, and that he was entirely ignorant of any witnesses having been examined therein, until the 5th *December* instant, when he was informed by *Lambert* of such examination, and of the publication of depositions long since ; and he swore that he had not read or seen the depositions, nor was acquainted with the purport or contents thereof. The affidavit of Mr. *Delmar* (clerk to the former solicitors for the Plaintiffs) stated that the Deponent firmly believed that, on the Plaintiffs' interrogatories being filed, the examiner's clerk or agent was informed of the names of the different clerks in Court acting for the Defendants, and that the Deponent himself, and the several other witnesses for the Plaintiffs, were shown at the seats of *Smith* and the other clerks in Court for the Defendants, prior to their being examined ; though, from the distance of time, and not having made any memorandum, he had not so distinct or perfect a recollection of what actually passed on the various occasions alluded to, and could not depose with positive certainty.

On the hearing of this Motion, and reading the above affidavits, the *Lord Chancellor*, for his further satisfaction, ordered the examiner to certify to the Court whether or not, previous to the examination of any and which of the witnesses, the Plaintiffs, their clerk in Court, or agent, delivered to the examiner,

or his copying clerk, the names of the six clerks, or sixty clerks of the Defendants, or any and which of them, and in case the names of any such six clerks, or sixty clerks, were so delivered, then the examiner was to state the names of such six clerks, or sixty clerks.

1816:

 CHOLMONDE-
 LEY
 v.
 CLINTON,
 and others.

In pursuance of this Order, Mr. *Pierce* the examiner certified that, previous to the examination of any of the witnesses, the Plaintiff, his solicitor or solicitors, his clerk in Court or agent, did not deliver to the examiner, or (to his knowledge or belief,) to the sworn copying clerk in his office, the names of the six clerks, or sixty clerks, of the Defendants, or any or either of them, except the name of Mr. *Shaddick* as clerk in Court for the Defendants. *Corfield* (the sworn copying clerk in the examiner's office during the year 1814) also deposed by his affidavit, that, on the 23d of April, 1814, he received from *Delmar* Interrogatories for examining witnesses on behalf of the Plaintiff for the purpose of filing the same, when *Delmar* informed the Deponent that *Hanrott* was the Plaintiffs' solicitor, and *Seymour* and *Squibb* the Defendants' solicitors, and *Shaddick* their clerks in Court; thereby meaning (as the Deponent understood and verily believed) that *Seymour* and *Squibb* were solicitors for all the Defendants, and *Shaddick* their clerk in Court; and that he indorsed the Interrogatories with the names of *Hanrott*, *Seymour*, and *Squibb*, and *Shaddick* only, according to the usual practice of indorsements on Interrogatories, from the dictation of *Delmar*. That (to the best of his recollection and belief) he produced the Plaintiffs' witnesses at the seat of *Shaddick* only, and not at the seats of the other clerks in Court; and that the Deponent was the better enabled to depose thereto, from having lately perused his own memoranda on the Interrogatories.

1818.

 CHOLMONDE-
 LEY
 v.
 CLINTON,
 and others.
 Dec. 20.

The LORD CHANCELLOR ordered, That the depositions of witnesses taken in this cause on behalf of the Plaintiff be suppressed, as to the Defendants Sir L. V. Palk and others, but gave liberty to the Plaintiffs to make a new Motion respecting such depositions.

Dec. 24.


In pursuance of the Lord Chancellor's permission, a Motion was now made on behalf of the Plaintiffs, That the Defendants Sir L. V. Palk, Lady E. Palk, the Earl of Shaftesbury, and Sir Thomas Tyrwhitt, might be at liberty to cross-examine the witnesses already examined on behalf of the Plaintiffs, and to examine other witnesses; and that the Plaintiffs might be at liberty, at the hearing of the cause, to read, as against the said Defendants, the depositions of the witnesses who had already been examined on the part of the Plaintiffs; or otherwise, That the Plaintiffs might be at liberty to examine over again, as against the last-mentioned Defendants, upon the Interrogatories already filed, the witnesses examined on behalf of the Plaintiffs; and that the said Defendants might be at liberty to cross-examine those witnesses and examine other witnesses as they might be advised.

Leach and *Shadwell*, in support of the Motion, cited *Spence v. Allen* (a), and *Copeland v. Stanton* (b), alleging that the irregularity complained of, arising from a mere official blunder as to the name of the clerk in Court for the Defendants, was not such as ought to deprive the Plaintiffs of the testimony of the witnesses who had been examined; admitting that, in order to entitle themselves to the benefit of the depo-

(a) Pre. Cha. 493.

(b) 1 P. W. 414. *Debrox* v. — cited in that case, 415.

sitions, they were bound to place the Defendants in the situation in which they would have stood but for the mistake committed.


1816.

 CROLMONDE-
 LEY.
 v.
 CLINTON,
 and others.

Hart, Horne, and Longley, for the Defendants, Sir *L. Palk* and others, contended, that this was no case for indulgence, and relied on the rule of the Court, not to permit the re-examination of witnesses after publication past, as strict and inflexible, being founded on the danger of perjury; which would be equally incurred in the event of granting the alternative of the Motion, viz. that the Defendants might be at liberty to cross-examine the witnesses already examined (a); distinguishing the cases cited from the present, and arguing that the circumstances were such as to render it impossible for the Court, by granting the Motion, or by any modification of it, to place the parties in the same situation of advantage in which they would have stood if the slip had not happened, and consequently that the Court could not rectify it with justice to the Defendants.

[A similar motion was made by *Leach* against the Defendants *St. John* and *Fortescue*, which was resisted by *Benyon* and *Blake* on the part of the Defendants.]

The LORD CHANCELLOR said he was clear that the Court had an undoubted right to rectify a mere slip in its proceedings; but that the Defendants were certainly entitled to have the depositions suppressed if they thought fit to insist upon it. They must therefore have the option, either of allowing the depositions to stand, with liberty to cross-examine these

(a) Lord *Bacon's* order, was cited, with the references
 74. (Beames's Ord. in Ch. 33) in Mr. Beames's notes.

1816.

 CHOLMONDE-
 LEY.
 v.

CLINTON,
 and others.

witnesses, and to examine others, if they should think proper; or of having the depositions suppressed, with leave to the Plaintiffs to re-examine the same witnesses.

The defendants to have their costs of both Motions.

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June 27.

Sept. 2.

Nov. 1. 27.

ELIZABETH GREEN, Widow, PLAINTIFF;

AGAINST

EDWARD HENRY GREEN, DEFENDANT.

By settlement **EDWARD GREEN**, deceased, the late husband of the Plaintiff and father of the Defendant, being by virtue of a settlement made in the year 1740, on the marriage of his father and mother, and of a subsequent deed dated in the year 1753, entitled, as tenant in tail male, in remainder expectant on the decease of the survivor of them his said father and mother, to the manor of *Lawford*, and various other hereditaments, freehold as well as copyhold, intermarried estates to which *E. G.* was entitled as tenant in tail in remainder, are expressed to be settled, as to part, to the use of *E. G.* for life, remainder to the Plaintiff for life, remainder to the first and other sons of the marriage, and, as to part, to the use of *E. G.* for life, remainder to the first and other sons, &c. immediately on the determination of his life estate. Other estates, to which the Plaintiff was entitled in fee-simple, are by the same settlement conveyed to similar uses.

Upon the death of *E. G.* the Defendant (his only son and heir-at-law) enters on the estates to which he was entitled as tenant in tail under the settlement, and brings ejectments to recover possession of those to which his father was entitled as tenant in tail at the time of the settlement, and into which the Plaintiff had entered on his death, as tenant for life under the settlement, as not having been duly conveyed to the uses of the settlement. An injunction was granted, on the ground of election, to restrain the Defendant from proceeding in these ejectments,

with the Plaintiff, who was the daughter of *Henry Crossman* and *Elizabeth* his wife; and by indentures of settlement, dated the 2d and 3d of *September*, 1768, previous to the said marriage, it was witnessed that, *Edward Green* the elder, and *Catharine* his wife, (the father and mother of the Plaintiff's said late husband) and he the Plaintiff's said late husband, conveyed these estates, as to part thereof to the use of the father and mother successively for life, with remainder to *Edward Green*, the Plaintiff's husband, for life, with remainder to the Plaintiff for life, with remainder to the first and other sons of the marriage in tail, and, as to other parts, immediately to the husband for life, with remainder to the first and other sons in tail; subject, as to a portion of the latter, to the trusts of a term of 800 years for raising the portions of younger children of the marriage. By the same indenture, *Crossman*, and wife, (the Plaintiff's father and mother,) together with the Plaintiff, conveyed certain hereditaments, of which they or some or one of them were or was at that time seised in fee simple, to the same respective uses, as to the several parts thereof, after the death of them the Plaintiff's said father and mother, as the uses to which the former estates were conveyed respectively, after the death of *Edward Green* the elder and his wife. The settlement contained several covenants on the part of *Edward Green* the elder and of *Crossman* and wife, to surrender certain copyhold parts of the premises intended to be conveyed to the uses of the settlement, and a covenant by *Crossman* to assign his interest in a mortgage, on which the sum of £800 was due, upon trust to lay out the same in the purchase of real estates to the use of the Plaintiff's husband for life, with remainder to trustees for a term of years for the better securing the portions intended for younger children; subject thereto to the first and other sons in tail.

1816.

 GREEN
 v.
 GREEN.

1816.

 GREEN
 v.
 GREEN.

Edward Green the elder and his wife, and *Crossman* and his wife, all died in the life-time of the Plaintiff's husband, who entered into possession of all the settled estates, and continued in possession till his death, in 1814, whereupon the Defendant entered into possession of the manor of *Places*, (part of the estates settled by the *Crossmans*,) and other hereditaments, to which he became entitled as tenant in tail in possession under the settlement, and the Plaintiff entered into possession of the *Lawford* estate, as tenant for life thereof; but the Defendant claiming to be entitled as tenant in tail in possession of the *Lawford* estate, by virtue of his original title under the deed of 1740, the estate tail-created thereby not having been barred, but still subsisting at law, brought actions of ejectment against the Plaintiff his mother, and against the several tenants in occupation of that estate, and likewise distrained for rent; to restrain which proceedings the present Bill was filed, charging among other things that, although the Defendant was entitled at law to the *Lawford* estate, as tenant in tail in possession; yet by the limitations in the settlement, the Plaintiff was entitled thereto in equity as tenant for life; and praying that it might be declared that the Defendant had elected to take under the settlement, and that he might be decreed to confirm the same, and to permit the Plaintiff to take possession of the *Lawford* estate, and other premises limited to her for life; but in case the Court should be of opinion that he had not already made, then that he might be put to his election, whether he would take under or against the settlement; and, if against, then that he might be decreed to deliver up possession of the manor of *Places*, and other the estates conveyed by the *Crossmans*, and that a commission might issue to assign to the Plaintiff her dower out of the *Lawford* and other estates. The Bill also prayed an im-

junction to restrain proceedings at Law, and a receiver, both of the *Lawford* estate, and of the estates of which the Defendant had got into possession or receipt of the rents and profits.

1816.

 GREEN
 v.
 GREEN

The Defendant by his Answer submitted that, on the death of his father and mother, *Edward Green* (the father of the Defendant and husband of the Plaintiff,) became entitled as tenant in tail male in possession, and not merely as tenant for life in possession, to all such freehold and copyhold premises as were, by the deeds of 1740 and 1758, limited to him as tenant in tail in remainder, and also, on his marriage, became entitled, as tenant for life in possession, to all such freehold and copyhold premises as were by the deed of 1768 limited to him for life on the solemnization of the marriage. That, on the death of *Crossman* and his wife (the Plaintiff's father and mother), he became entitled, as tenant for life in possession, to all other the freehold and copyhold premises not comprised in the deeds of 1740 and 1758, and which were limited to his said father for life, upon the deaths of the said *Crossman* and wife, by the deed of 1768. That the said *Edward Green*, (the Defendant's father,) never did any act to bar his estate tail, and that if any recovery was suffered by his father or mother, or either of them, they had no estate tail upon which it could operate. That, on the death of his said father, the Defendant became entitled, both at law and in equity, as tenant in tail male, to the *Lawford* estate, as well as the other estates, of which his father was tenant in tail male, under the deeds of 1740 and 1758. He admitted that he had taken possession of the manor of *of Places* and other premises to which he was entitled as tenant in tail male under the settlement; that the Plaintiff had taken possession of the *Lawford* estate,

1816.
GREEN
v.
GREEN.

to which he the Defendant claiming to be entitled (as tenant in tail male under the entail existing at the time of the settlement and also at the death of his father) had commenced the actions against the Plaintiff, and also against the tenants, which the Bill sought to restrain him from proceeding in; two of which last-mentioned actions had been tried, and in the first a non-suit had been directed, subject to the opinion of the Court of King's Bench; in the other, a verdict had been obtained, by means of which the Defendant had recovered possession of the tenement in question, and the tenant had since attorned. He submitted to the Court whether he had or not elected to take under the settlement, or whether he ought now to be put to his election, insisting that in all events he was not bound to confirm the settlement so far as the same could be considered as attempting to comprise the *Lawford* estate, and any hereditaments which the Defendant's father was entitled to as tenant in tail, or in tail male, expectant or otherwise, at the time of the settlement; that he ought not to be compelled to give up possession of the manor of *Places*, or of any of the benefits derived from the *Crossmans* under the settlement; and that, if the Plaintiff should be considered as entitled to any compensation or satisfaction for the loss of the estate for life, attempted to be created by the settlement in the *Lawford* estates, and other hereditaments, in her favour, she could not be considered as entitled to the manor of *Places*, or any of the estates derived from the *Crossmans*, or to retain possession of the *Lawford* and other estates to which the Defendant was so entitled as aforesaid, independent of the settlement. He likewise submitted the question of the Plaintiff's title to dower in case the Defendant should recover possession.

A motion was made, on the part of the Plaintiff,

for an injunction to restrain the Defendant from proceeding in the action of ejectment commenced by him, and from bringing or carrying on any action or actions against the Plaintiff, or against any of the tenants of the *Lawford* estates, and from distraining upon the said tenants or any of them, and from proceeding in any distresses already made upon them or any of them, for rent, and from any other proceedings at law to recover possession of the said estates, or of the rents and profits thereof, and that it might be referred to the Master to appoint a receiver of the *Lawford* estates, and also of all the estates conveyed by the *Crossmans*, of which the Defendant was in possession or in receipt of the rents and profits.

1816.
GREEN
v.
GREEN.

Leach and *Shadwell*, in support of the motion.

Sir *S. Romilly*, *Bell*, and *Bernal*, contra.

Distinguished this case from that of *Tibbits v. Tibbits* (a), in which an injunction had lately been granted, which, on a motion to dissolve, was ordered to be continued to the hearing; contending that the present was a very peculiar case, and one that would involve, whenever it should come to be decided, an entirely new question, viz. Whether a person, having the legal title to two estates, as tenant in tail in possession, of the one under a prior settlement and of the other under a settlement which mistaking the rights already created, seeks to postpone his interest in the former, by interposing a life estate in another person, who, but for the latter settlement, would have been entitled to a vested interest in the second estate in possession, can be prevented in equity from enforcing his legal title to both estates. All that a Court of Equity could do in such a case was, as they insisted, to consider whether any and what compensation

(a) See note at the end of this case:

1816.

GREEN

v.

GREEN.

was fit to be made under the circumstances. And they cited *Lady Cavan v. Pultney* (a), and *Dashwood v. Peyton*. (b)

Leach, in reply.

As it is admitted, on the part of the Defendant, that he cannot, in equity, claim the one estate by virtue of his legal title, without either giving up the other, or, at all events without making compensation, the principle upon which the present application is founded seems to be sufficiently established.

The LORD CHANCELLOR :

If the Defendant proceeds in his ejectment, I think that will amount to an election. Let the present motion stand over, in order that he may be sufficiently aware of the situation in which he is placed ; and, if after that he resists the application, I shall consider that in so doing he has elected.

Sept. 2.

The LORD CHANCELLOR afterwards intimated the following opinion relative to the questions in the case :

When a party elects, under a settlement, to take one of two beneficial interests, whether he is bound in equity to give up the other absolutely, or only to make compensation ; *quære.*

This is a case which, though not of extreme detail, involves a point of greater difficulty than appears to have been apprehended when it was considered at the bar, viz. whether, when a party elects under a settlement, to take one or the other of two beneficial interests, he is bound in equity, only to make compensation to those who are disappointed by the election, or to surrender entirely the other part of the title under which he claims. I have looked into a variety of

(a) 2 Ves. 544. and Lord (b) 16 Ves. 27.
Darlington v. Pultney, 3
Ves. 384.

printed books, and can find no decisive authority on this subject; and in so dubious a light does the argument at present appear, that I feel it necessary to direct a search to be made into the Register's books, with a view to the discovery of some case in point.

1814.
GARR
v.
GARR.

After the long vacation, the case was again mentioned by the Counsel for the Plaintiff, who submitted that the point raised by the present motion did not necessarily involve the question as to which the LORD CHANCELLOR had directed the search above mentioned; it being merely whether the Court would permit the Defendant to oust his mother by proceeding in the ejectment before that question could be determined.

Nov. 1.

The LORD CHANCELLOR :

There are two questions raised by the present motion; the first is a question of fact, whether the Defendant has made his election; the second of law, whether, if he does not think proper to abide by the election he has made, he may be compelled on the one hand to give up the estates derived from his mother's family under the settlement, or on the other to make compensation for the value of her intended life-interest in the *Lawford* estates. As to this latter question, I have looked into all the cases, both reported and in manuscript, in order to discover how far it is settled that the principle of election requires the giving up the whole estate, or only the making compensation for the value of it. Some decisions consider that the election is to take or relinquish *in toto*; others—as was held by Lord Chief Justice *De Grey*, in *Pultney*

Nov. 27.

(a) See *Lady Cavan v. Pultney*, 2 Ves. jun. 560. There is no report of the case of *Pultney v. Earl of Darlington*.

1816.

GREEN

v.

GREEN.

v. Darlington—that the estate must be sequestered till compensation is made. All the cases which have been referred to, arose out of wills affecting the title under other instruments. (a) In the case last mentioned, it was determined that the principle of election applies to the thing itself which was the object of it; and, from the decision, it looks as if it appeared to the Court that the person electing must either take or relinquish *in toto*. Now, if the principle applies to the *thing*, it is very difficult to say that it lies in compensation. In the present case, *Edward Green* the younger became a purchaser, for himself and his family, of the estates conveyed by the *Crossmans*. Being tenant in tail of the *Lawford* estate, under the former deeds, he did not effectually convey his interest; and his son now claims that estate by virtue of the original title. The question is, shall he be permitted to take without making good the contract entered into by his father on the marriage? I certainly incline to think that he must either give up the whole of the benefit to which he is entitled under the settlement made on his father's marriage, or, if he will not, that he must make good the contract. But when I express myself as having formed this opinion, I am not able to find that it is directly supported by any former decision. The principle, however, is, that if a man will not give the price which the parties meant he should give, he shall not have the thing which was bargained for. At the same time, nobody can read the cases on this subject with-

The principle upon which a person is put to his election, under a contract, is, that if he will not give the

ton; but Lord Chief Justice *De Grey's* words in that case are cited in the case referred to.

(a) But see *Freke v. Lord Barrington*, 3 Bro. C. C. 274.; *Bigland v. Hudleston*, *ib.* 285.

note; *Chetwynd v. Fleetwood* 4 Bro. P. C. 435; *Moore v. Butler*, 2 Scho. and Lef. 266.; in all which the doctrine of election appears to have been held to extend to deeds.

out seeing doctrines stated, which are directly contrary to each other. The last reported case of *Thellusson v. Woodford* (a) lays down the doctrine, that a person shall not claim an interest under an instrument without giving full effect to it as far as he can; renouncing any right or property which would defeat the disposition, and renouncing it altogether. Yet there are a number of cases deciding that, where an express or implied condition arises upon a will, the party taking is not bound to give up more than is enough to make satisfaction for that which was intended for another. The question under a settlement is different, because there an express contract has been entered into between the parties; and Chief Justice *De Grey* seems to advert to this distinction, when he says, that an express condition "must be performed as framed; and, if it is not, that will induce a forfeiture; but the equity of this Court is to sequester the devised interest *quousque*,—till satisfaction is made to the disappointed devisee." (b) To apply that principle to the present case, where a father has purchased for the benefit of his daughter by the marriage-contract, shall this Court say, the son is not bound to pay the entire price of that contract?

187d
GREEN
v:
GREEN,
price intended,
he shall not
have the thing
contracted for.

Question, as
to Election, dif-
ferent, where it
arises under a
Will, and where
under a Settle-
ment.

" Order for an injunction to restrain the Defendant from proceeding in the ejectment commenced against the Plaintiff, and from bringing any action against the Plaintiff or any of the tenants of the manor of *Lawford*, &c. and from distraining upon the said tenants or any of them, and from proceeding in any distrresses

(a) before Lord *Erskine*,
13 Ves. 220. Affirmed on
appeal, 1 Dow. 249.

(b) 2 Ves. jun. 560.

1816.
 GREEN
 v.
 GREEN.

already made, or taking any other proceedings at law to recover possession of the said manor, &c., or the rents and profits thereof, till hearing or further order."

Reg. Lib. A. 1816. fo. 592. (a)

(a) The following was the case referred to *ante*, p. 91.

TIBBITS v. TIBBITS.

Nov. 14, 16, 17.
 1816.

By settlement on the marriage of *Charles Tibbits*, *Richard Tibbits* his father, together with the said *Charles Tibbits*, conveyed to trustees, in trust for *Richard* during his life, with remainder to *Charles* and the issue of the marriage as therein mentioned, among other premises, two farms in the county of *Warwick*, which were the subject of this suit; with powers to grant leases for 21 years at improved rents and for sale, &c.


Richard Tibbits afterwards, by his will, devised and bequeathed to his son, *Charles Tibbits* all his freehold, copyhold, and leasehold estates, in the counties of *Northampton*, *Warwick*, and *Middlesex*, (comprising by name the settled estates of which he was only tenant for life under the settlement) to and for his own use and benefit absolutely, subject to the payment of certain annuities, debts, and legacies, and then proceeded in the words following :

" And I do hereby recommend to my said son to continue
 " his cousins, *James Tibbits*, and *Richard Tibbits*, in the oc-
 " cupation of their respective farms in the county of *War-*
 " *wick*, as heretofore, and so long as they continue to manage
 " the same in a good and husbandlike manner, and to duly
 " pay their rents.

The Testator also gave to his nephews, the said *James* and *Richard*, legacies of £100 each, and to his son *Charles*, whom he appointed executor, the residue of his real and personal estate.

The original Bill, filed by the two nephews, after stating the will, and death of the Testator, proceeded to show that

the Plaintiffs had respectively held the two farms in question, as tenants to the Testator, during the respective periods of twelve and ten years previous and up to the time of his decease, at certain yearly rents; that they duly paid the said rents, up to the Michaelmas after the Testator's death, to his son, the Defendant *Charles Tibbits*, who had since refused to receive the same and brought ejectments for the recovery of the premises; therefore praying, that the will might be established and the Defendant declared a trustee for the Plaintiffs in respect to their tenancy at the said respective rents; and that the said Defendant might elect to continue the Plaintiffs in their respective occupations during their respective lives, or at least during the life of the Defendant, at the said yearly rents and no more, the Plaintiffs respectively paying the rents and managing their respective farms in a good and husbandlike manner, in conformity with the will of the Testator; or otherwise that the Defendant might renounce all benefit under the will; and for an injunction to stay proceedings in the ejectments.

1816.

 GREEN
 v.
 GREEN.
Tibbits v. Tibbits.

The Answer admitted all the material facts of the case, stating that the Testator never exercised his leasing power under the settlement, and that the Plaintiffs occupied the farms in question only as tenants at will; that the farms were worth to be let considerably more than the rents paid by the Plaintiffs in respect of them; and contending, that the words made use of in the Testator's will could only be considered as recommendatory to the Defendant to continue the Plaintiffs respectively in the occupations of the said farms as tenants from year to year, without any restriction as to the rents to be paid for the same.

On the 26th of *February*, 1810, an injunction was awarded to the Plaintiffs till further order; and by two several orders of the 10th of *December*, 1810, and 2d of *November*, 1811, the Plaintiffs were directed to pay to the Defendant certain sums on account of rent, at the rate under which they held their farms respectively during the Testator's life-time, but without prejudice to any of the questions in the cause.

On the 19th of *June*, 1810, a motion was made before the *Master of the Rolls*, sitting for the *Lord Chancellor*, on
 VOL. II. H

1816.



GREEN

v.

GREEN.

Tibbits v. Tib-
bits.

behalf of the Defendant, to dissolve the injunction, which was refused, and the injunction ordered to be continued till the hearing.

The Plaintiff, *Richard Tibbits*, afterwards died, and the suit was revived by his executors.

November 14, 1815. The cause came on before the *Lord Chancellor*, to be heard, and was very fully argued on that and the two following days, by *Sir Samuel Romilly, Hart, and Raithby*, for the Plaintiffs; and by *Leuch and Bell*, for the Defendants. The following cases were cited, *Noys v. Mordaunt* (a), *Streathfield v. Streathfield* (b), *Broughton v. Broughton* (c), *Hearle v. Greenbank* (d), *Macnamara v. Jones* (e), *Lady Cavan v. Pultney*, and *Earl of Darlington v. Pultney* (f), *Whistler v. Webster* (g), *Lewis v. King* (h), *Thellusson v. Woodford* (i), *Wake v. Wake* (k).

The LORD CHANCELLOR considered that the case involved two questions; first, whether the Defendant had made an election; and the other, whether it admitted of the doctrine of compensation, as to which he directed a search to be made for precedents; but his judgment is still depending.

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| (a) 2 Vern. 681. Prec. | (f) 2 Ves. jun. 560. |
| Cha. 265. Gilb. Eq. Rep. 2. | (g) 2 Ves. jun. 367. |
| (b) Ca. t. Talb. 176. | (h) 2 Bro. 600. |
| (c) 2 Ves. 12. | (i) 13 Ves. 220. |
| (d) 3 Atk. 695. 716. 1 | (k) 3 Bro. 255. 1 Ves. jun. |
| Ves. 198. 306. | 335. |
| (e) 1 Bro. 488. | |

1816.

Ex parte WHITBREAD in the Matter of HINDE, Dec. 19.
a Lunatic.

BY an Order made on the 24th of *April*, 1816, it was referred to the Master to enquire and certify whether it would be reasonable and proper that any and what increase should be made to the then allowance for the maintenance and support of the Lunatic, regard being had to his circumstances and estate, and also to the situation of his immediate relations, and from what time such increase should take place.

Practice of making an allowance to the immediate relations of a Lunatic, other than those whom the Lunatic would be bound to provide for by law, extended to the case of brothers and sisters and their children, and founded not on any supposed interest in the property, which cannot exist during the Lunatic's lifetime, but upon the principle that the Court will act with reference to the Lunatic, and for his benefit, as it is pro-

The Master made his Report, dated the 17th of *August*, whereby, after stating the circumstances of the Lunatic's estate and family, and the former orders made in the matter of the lunacy, he certified that he was of opinion that an increase of £800 per annum should be made to the sum of £1200 then allowed for the maintenance and support of the Lunatic; and with respect to the Lunatic's immediate relations, he submitted that, regard being had to their respective circumstances, the several yearly payments in his Report mentioned should be made to them respectively out of the increased allowance.

No objection was taken to this Report, which, on the 23d of *August*, was ordered to be confirmed; but the order was not drawn up, and the present petition was presented by a niece of the Lunatic, one of the

probable the Lunatic himself would have acted if of sound mind. The amount and proportions of such an allowance are, therefore, entirely in the discretion of the Court.

1816.

Ex parte
 WHITBREAD
 in the Matter of
 HINDE.

immediate relations provided for by the Report, who conceived herself aggrieved by the Master's apportionment, praying that the minutes might be varied in the several particulars specified, and especially that the Report might not be confirmed as to the apportionment of part of the Lunatic's allowance among his relations in the manner therein mentioned, but that the *Lord Chancellor* would be pleased to make such order or declaration as would enable the Petitioner to receive such other proportion of the said allowance as the Petition required. (a)

Hart, in support of the Petition.

(a) The claim now made by this Petitioner was also discussed on the hearing of the former petition to confirm the Report when it was objected, that the next of kin of a Lunatic, during his life, have no direct or vested interest entitling them to an allowance out of the sum assigned by the Court for the maintenance of the Lunatic; that the Court, in directing what allowance is to be made, forms its judgment from circumstances rendering it probable what the Lunatic himself would do, if he were in a capacity to exercise any discretion on the subject. Some enquiry was then made as to the origin of the practice of granting an allowance for the relations of a Lunatic (other than those whom the Lunatic is bound by law to provide for), which, it was apprehended, could not be traced to an earlier period than the Chancellorship of Lord *Rosslyn*; but in the result an order of Lord *Thurlow's* was produced, in the Matter of *Cotton*, which was made upon an objection to a report allowing maintenance generally, without specifying the proportions which were meant to be granted to the relations respectively. It was referred back to the Master to review his Report; who thereupon certified that the sum allowed was appropriated; and, after specifying the sum allowed for the Lunatic himself, stated that the remainder was to be divided among his immediate relations. Lord *Thurlow* confirmed this Report, and directed the allowance to be paid by, and allowed to, the committee, on passing his accounts.

Sir S. Romilly, Leach, and Wetherell, contra,

1816.

Ex parte

WHITBREAD

in the Matter of

HINDE.

Cited *Smith v. The Attorney General* (a), that the next of kin of a Lunatic, however hopeless his condition, have no interest in the property ; and said, that where any allowance is made for the family of a Lunatic, it is upon the principle of tenderness towards the Lunatic himself, which, it was not pretended, could operate in the instance now before the Court.

Hart, in reply,

Argued that the discretion of the Court, as to the quantum of allowance proper to be made, was not wholly unlimited, but must be governed by the precedents established in similar cases. Wherever the personal property of a Lunatic is applied to any purpose but the personal use of the Lunatic, the Court looks closely at the legal rights of the party in whose favour the allowance is made.

The LORD CHANCELLOR :

For a long series of years the Court has been in the habit, in questions relating to the property of a Lunatic, to call in the assistance of those who are nearest in blood, not on account of any actual interest, but because they are most likely to be able to give information to the Court respecting the situation of the property, and are concerned in its good administration. It has, however, become too much the practice that, instead of such persons confining themselves to the duty of assisting the Court with their advice and management, there is a constant struggle among them to reduce the amount of the allowance made for the Lunatic, and thereby enlarge the fund

(a) Cited by the Lord Chancellor, in *Dursley v. Fitzharing*, 6 Ves. 260.

1816.

Ex parte

WHITBREAD

in the Matter of

HINDE.

which, it is probable, may one day devolve upon themselves. Nevertheless, the Court, in making the allowance, has nothing to consider but the situation of the Lunatic himself, always looking to the probability of his recovery, and never regarding the interest of the next of kin. With this view only, in cases where the estate is considerable, and the persons who will probably be entitled to it hereafter are otherwise unprovided for, the Court, looking at what it is likely the Lunatic himself would do, if he were in a capacity to act, will make some provision out of the estate for those persons. So, where a large property devolves upon an elder son, who is a Lunatic, as heir at law, and his brothers and sisters are slenderly or not at all provided for, the Court will make an allowance to the latter for the sake of the former; upon the principle that it would naturally be more agreeable to the lunatic, and more for his advantage, that they should receive an education and maintenance suitable to his condition, than that they should be sent into the world to disgrace him as beggars. So also, where the father of a family becomes a lunatic, the Court does not look at the mere legal demands which his wife and children may have upon him, and which amount, perhaps, to no more than may keep them from being a burthen on the parish,—but, considering what the Lunatic would probably do, and what it would be beneficial to him should be done, makes an allowance for them proportioned to his circumstances. But the Court does not do this because, if the Lunatic were to die to-morrow, they would be entitled to the entire distribution of his estate, nor necessarily to the extent of giving them the whole surplus beyond the allowance made for the personal use of the Lunatic.

The Court does nothing wantonly or unnecessarily to alter the Lunatic's property, but on the contrary

takes care, for his sake, that, if he recovers, he shall find his estate as nearly as possible in the same condition as he left it, applying the property in the mean time in such manner as the Court thinks it would have been wise and prudent in the Lunatic himself to apply it, in case he had been capable.

1816.
Ex parte
 WHITBREAD
 in the Matter of
 HINDE.

The difficulty I have had was as to the extent of relationship to which an allowance ought to be granted. I have found instances in which the Court has, in its allowances to the relations of the Lunatic, gone to a further distance than grand-children—to brothers and other collateral kindred; and if we get to the principle, we find that it is not because the parties are next of kin of the Lunatic, or, as such, have any right to an allowance, but because the Court will not refuse to do, for the benefit of the Lunatic, that which it is probable the Lunatic himself would have done.

[No Order was made upon the Petition.]

—*—*—*—

Dec. 24.

CUTLER and Others v. SIMONS and Others.

THE Bill was filed by the Trustees for sale, under a Conveyance, of the estates of Sir Gerard Noel Noel, Baronet, against the Defendant *Simons*, who had agreed to become the purchaser of certain parts of the estates, at a public auction, for a specific per-
 Acts of Ownership, amounting to waste, by alteration and conversion of property, sufficient to induce the Court to order payment of purchase-money into Court, upon the ground that a Vendor has a lien on the estate for the amount, and might have filed his Bill to restrain the Purchaser in possession from committing such acts of ownership.

Though the Bill contained no charge of such acts having been committed, the Order was made on affidavit supplying the fact; the Defendant not having answered, nor being in contempt, nor under any order for time.

1816.

CUTLER

v.

SIMONS.

formance of his agreement, and against the necessary parties. The estates were sold in several lots, on the 11th of *May*, 1813, and the Defendant was declared the highest bidder for two of the lots. By the Conditions of sale, the purchaser was, at the time of sale, to pay a deposit of £15 per cent. and sign an agreement for payment of the remainder of his purchase-money on or before *Michaelmas*, 1813, upon having a good title, and all outgoing to that time cleared by the vendor; in default of payment, the purchase-money to carry interest at £5 per cent. from that time; the timber and timber-like trees, &c. to be taken at a valuation; the amount to be ascertained on or before *Michaelmas*, and paid for on completing the purchase. The Defendant paid his deposit, and signed the agreement accordingly; and shortly afterwards agreed for the purchase of the timber also at a certain price. At *Michaelmas*, 1813, he was let into possession, and had ever since continued in possession, and in receipt of the rents and profits. The abstract was duly delivered, and a conveyance prepared by the purchaser in *June*, 1814, which was afterwards approved by the vendors, and executed by them and by the Defendant Sir *Gerard Noel Noel*, and other conveying parties. The Bill was filed in *October*, 1816, and the Defendant (the purchaser) had not yet answered, nor was in contempt, nor under any order for time.

Under these circumstances, a Motion was made, on the part of the Plaintiff, that the Defendant might be ordered, within a fortnight, to pay into Court the whole amount of his purchase-money for the estate and of the valuation of the timber, and that the same when paid in, might be laid out, &c. The motion was supported by affidavit of the above facts, and that the Defendant "had committed various acts of

“ownership on the premises, viz. that he had taken
“possession, ploughed up part of the meadow-land,
“filled in ditches, grubbed up hedges, and formed
“both the estates sold as lots 22, and 23, into one.”

1816.
~
CUTLER
v.
SIMONS.

Sir *S. Romilly* and *Dowdeswell*, in support of the motion.

Wingfield, for the Defendant Sir *Gerard Noel Noel*, also supported the motion.

Simpkinson, for the Defendant the purchaser, resisted the application on the grounds that the mere fact of possession being taken, was not sufficient to bring the money into Court, and that the acts of ownership stated in the affidavit were not charged by the Bill.

The notice of motion was also objected to as not making any deduction from the purchase-money required to be paid in, in respect of the sum paid as a deposit; but it was answered, that this was for the purpose of covering the interest payable according to the conditions of sale from *Michaëlmass*, 1813, to the present time which it was alleged would exceed the sum specified in the notice.

The LORD CHANCELLOR :

The general rule is, that a purchaser not in possession cannot be required to pay his purchase-money into Court; and if by the terms of his contract he is to have possession before the conveyance is executed, the mere fact of his taking possession under that agreement will not entitle the vendor to call upon him for payment; and upon this ground, that the vendor has a lien on the estate for the amount. But, even in such a case, the Court will not permit a purchaser in

1816.

 CUTLER
 v.
 SIMONS.

possession to commit acts of ownership tending to alter the nature of the property which constitutes the security of the vendor, and upon which he might come into this Court, if he pleased, to restrain him by injunction; and affidavits have, under those circumstances, been allowed to show that acts of that nature, have been committed, even though the Bill should contain no allegation to such effect.

With regard to the form of the notice, it being admitted that the amount of interest due on the purchase-money would exceed the deduction claimed in respect of the deposit, the order was made according to the terms of the motion, for payment into Court of the sums therein specified, on or before the first day of the ensuing term.

[Reg. Lib. A. 1816. fo. 167.]

Similar Bills were filed against the purchasers of the several other lots; and the like order for payment of the purchase-money into Court was made upon affidavits stating various acts of ownership. The acts upon which these orders were founded were the following:—Erecting new, and pulling down old, buildings—planting a new orchard—throwing two meadows or fields into one—making a new garden—cutting down timber—under-letting the premises—changing the tenants—turning a tenant out of possession, though to take possession himself.

[See the several instances in Reg. Lib. 1816. A. fo. 150, 151, 159, 160, 165, 166, 167, 168, 171, 172, 430, 462.]

Bell, Horne, Heald, Shadwell, and Simpkinson, appeared for the different Defendants.

Some of the motions stood over, on the ground that the affidavits were not sufficiently positive as to the allegations of possession having been taken and of the acts of ownership said to have been committed, — others were opposed on the ground that the alleged acts of ownership, only amounting to acts done in the common course of cultivation, or necessary repairs, were not such as to come within the principle upon which the order was founded. But orders were afterwards made in these also, upon the vendors consenting that the conveyances should be deposited at the time of the purchase-money being paid into Court. (a)

(a) These orders appear to have settled the practice, partially adopted in some former cases, such as *Burroughs v. Oakley*, and *Dixon v. Astley*, (ante, vol. i. p. 52. 133. 376. n. 378. n.) as to payment into Court of their purchase-money, by purchasers in pos-

session, by virtue of the agreement, and otherwise. See also *Bonner v. Johnston*, vol. i. p. 366.

The practice has been further recognised and explained in the cases of *Morgan v. Shaw*, and *Crutchley v. Jeringham*, post, &c.

1816.
CUTLER
v.
SIMON.

Sir CHARLES MORGAN and Others (Trustees of the Equitable Insurance Company) PLAINTIFFS ;

AND

CHARLES MARSACK, and Sir FRANCIS BOYNTON, Bart. - - DEFENDANTS.

Dec. 17.

THE Bill stated that in February, 1788, John George Parkhurst, and Mary his wife, (formerly dame Mary Boynton, widow of Sir Griffith Boynton, Bart.) in consideration of £2200, granted to the Defendant

It is sufficient to support a Bill of interpleader that each of the Defendants has a

claim to the matter in question, although one only can maintain an Action at Law, the principle being, to prevent a Plaintiff from being doubly vexed. It is therefore not necessary that he should have been actually sued.

1816.

 MORGAN
 v.
 MARSACK.

Marsack an annuity during the life of the wife. That on the 20th of the same month a policy of insurance for the said sum of £2200, was granted to the Defendant *Marsack*, by the Equitable Insurance Company, upon the life of the said *Mary Parkhurst*. That by indentures of lease and release dated the 23d and 24th of *December*, 1793, between *Parkhurst* and his wife of the first part, the Defendant *Marsack* and two others, (as trustees appointed by or on the part of the said *Mary Parkhurst*, and of the several other annuitant creditors of the said *Parkhurst* and wife,) of the second part; and the said several other annuitant creditors of the third part; reciting that considerable arrears were due on the several annuities, and that the annuitants had agreed to accept the the respective sums therein mentioned, to be charged and secured as also therein mentioned, in lieu of their annuities; the said *Mary Parkhurst* appointed, and the said *Parkhurst* and wife granted and confirmed, to the said trustees and their heirs, certain hereditaments which had been allotted to the wife for dower, upon trust to retain and pay to the several annuitants, parties thereto, their executors, &c. in the first place, interest at £5 *per cent.* upon the principal sums so agreed to be accepted by them, and in the next place the several annual sums therein mentioned for insurance on the said principal sums; with a power for the said *Mary Parkhurst* at any time during her life to pay off and discharge the whole or any part of such principal sums.

In *June*, 1815, *Mary Parkhurst* died, having appointed her son, (the other Defendant,) her executor. Shortly after her death, the Defendant *Marsack* received from the *Royal Exchange Assurance Office* £1400, the amount of an insurance made by him with that office, for a part of the principal sum of

£3614, accepted by him under the trust deed; and there was then due to him from the *Equitable Assurance* Company upon the policy so granted to him as aforesaid, according to the rules of the office, the sum of £5216, which the Bill charged that the Plaintiffs, as trustees of the Company, were ready to pay to such person or persons as should be entitled thereto, but that the Defendant *Marsack* insisting that he was entitled to the whole sum, and *Boynton* on the contrary insisting that *Marsack* was entitled only to the extent of the £3614, and that he the Defendant *Boynton* ought to be paid and received the remainder as executor of *Mary Parkhurst*, the said Defendants threatened to bring actions against the Plaintiffs upon their respective claims, and the Plaintiffs were unable to ascertain to which of them the said sum of £5216 or any part thereof (except the £3614) belonged; therefore praying that they might interplead and settle their rights to the said sum; the Plaintiffs being ready and willing to pay the same to such of the parties as should appear to be entitled, and in the mean-time to pay the same into Court; that, upon paying the same into Court, the Defendant *Marsack* might deliver up his policy of insurance; and for an Injunction against both the Defendants from commencing any proceeding at law in respect of the sum so due as aforesaid.

The Plaintiffs now moved, upon affidavit, that they might be at liberty to pay the money into Court, and for an injunction, and delivery of the policy of insurance, as prayed by the Bill.

The Motion was supported on the part of the Defendant *Boynton*, but opposed by the other Defendant, upon the ground that this was not a proper case of interpleader, both as the Plaintiffs had not been ac-

1816.

 MORGAN
 v.
 MARSACK.

1816.

MORGAN.

v.

MARSACK.

tually sued, and as only one of the Defendants had a legal right to sue, or was capable of maintaining an action.

In reply, it was insisted that the principle upon which the bill of interpleader is founded, is to prevent a Plaintiff from being doubly harassed by opposite claims; and that an action at law and a suit in equity were not less a double vexation, than two actions at law. The following cases were cited: *Dungey v. Angove* (a), *Angell v. Hadden* (b), *Slingsby v. Boulton*. (c)

Leach and *Spranger*, for the Plaintiffs.

Sir *S. Romilly* and *Wingfield*, for the Defendant *Boynston*.

Hart and *Barber*, for the Defendant *Marsack*.

THE LORD CHANCELLOR:

It is necessary to a bill of interpleader, that the Plaintiff should admit a right in each party to sue him; and that right is admitted by the present Plain-

(a) 2 Ves. jun. 312. "A bill of interpleader will lie where a tenant may be liable to pay rent to one of two different persons. Both must claim in privity of contract and privity of tenure, as in the case of mortgager and mortgagees, trustees and *cestuy que trust*."

"A mere claim is a ground of interpleader." *Langston v. Boylston*, 2 Ves. jun. 107.

(b) 15 Ves. 244. 16 Ves. 202. It is no objection that no suit is instituted, if the claims are made. *Here*, and also in *The Duke of Bolton v. Williams*, 4 Bro. 297, the legal estate was in one person.

(c) 1 Ves. & B. 334. "The Plaintiff in a bill of interpleader admits a title against himself in all the Defendants."

See also *East India Company v. Edwards*, 18 Ves. 376.

tiff. There are many cases in which bills of interpleader have been entertained, where the demand of one Defendant was by virtue of an alleged legal, and of the other, of an alleged equitable right. That circumstance, therefore, constitutes no objection to the application.

1816.

MORRIS
 v.
MARSACK.

In this case a bill had been filed by the Defendant *Sir Francois Boynton*, against the other Defendant, for an injunction to restrain him from proceeding at law to recover the £5216; and an Injunction had been granted, which was afterwards dissolved upon the merits. It was contended that the fate of this Injunction had actually determined the rights of the parties, and consequently that there was no ground for interpleader. But the *Lord Chancellor* over-ruled this objection also.

It being admitted, however, that there was no question as to the Defendant *Marsack's* right to £2200 part of the sum in question, the Order made was for payment of the £2200 to the last-mentioned Defendant; and that the Plaintiffs should pay £3016 (the residue of the £5216) into Court, to be laid out and accumulate, subject to further order. Upon such payment being made, that the Defendant be restrained from proceeding at law against the Plaintiffs, and in case the Plaintiffs should not proceed to compel the Defendant *Boynton* to answer their Bill, the other Defendant was to be at liberty to apply to the Court as he should be advised.

[Reg. Lib. B. 1816. fo. 272.]

1817.

Jan. 17.

Ex parte ADAMS.

Construction of the act 36 G. 3. c. 90. s. 3. directing the transfer, in certain cases, of stock standing in the name of a Lunatic or of his committee; not to extend to stock standing in the name of another, to which the Lunatic is entitled as administrator.

THIS was a Petition by the Committee of a Lunatic, who was next of kin of one *Gilman*, (to whom also she had taken out administration,) for an Order on the Bank to pay him the dividends of certain stock standing in the name of the said *Gilman*, and to transfer the same under the statute. (a)

Rose, in support of the Petition.

Sir *A. Piggott*, for the Bank, objected that the Case did not fall within the provisions of the Act, which says only that "where stock is standing in the name of a Lunatic in his own right, or of the committee of his estate *in trust for, or as part of his property* it shall be lawful for the Lord Chancellor, &c. to order the Accountant-general to transfer, and to receive and pay over the dividend."

Rose, in reply, contended that the words in *Italics* might be construed so as to embrace the subject of the present application.

But the LORD CHANCELLOR was of opinion, that these words were controlled by the preceding, which limited it to the case of stock standing in the name of the Lunatic himself, or of his Committee, and refused the Petition.

(a) 36 G. 3. c. 90.

1857.

Feb. 5—7.

**LOWTEN v. THE MAYOR AND COMMON-
ALTY OF COLCHESTER.**

[MASTER of the
ROLLS for the
LORD CHAN-
CELLOR.} (a).

THE original Bill was filed by the Defendants, the Mayor and Commonalty of Colchester, against the Plaintiff's Testator, for delivery up of deeds and for an Injunction. By the Decree certain issues were directed, upon which Verdicts were found for the then Defendant, and the cause coming on for further directions, the Bill was dismissed with costs. The Master proceeded to tax the costs, and certified accordingly; shortly after which the Defendant died without having been paid his costs so taxed and certified. His executor now filed a Bill, praying that the suit which had abated by the death of the said Defendant, might be revived against the former Plaintiffs, who put in a general Demurren, which was endeavoured to be supported on the ground that there can be no revivor for costs alone.

Bell and Newland, in support of the Demurren.

Sir Arthur Pigott, Wetherell, and Spence, contra; contended, that this, being the case of the representative of a party deceased, seeking to revive for payment of costs taxed, after an abatement by the death of the party in whose favour the costs were awarded, constituted one of the cases of exception to the general rule.—[The case was very fully discussed at the

The general rule being that there shall be no revivor for costs alone, yet where the costs have been taxed previous to the abatement, it seems there is a right to revive merely for the purpose of having them paid; and, where the abatement has happened by the death of the party in whose favour the costs were awarded, it is the settled practice of the Court that his representative may revive for such purpose.

(a) During this term and the ensuing Vacation, in consequence of the severe illness of the Vice-Chancellor, the

Master of the Rolls sat for the Lord Chancellor on the days when His Lordship sat in the House of Lords.

1817:

LOWTEN

v.

THE MAYOR
&c. OF
COLCHESTER.

bar ; but, as the doctrine was afterwards so distinctly explained in the judgment given by the *Master of the Rolls*, it has been thought unnecessary to repeat the substance of the arguments. After hearing what was said on both sides, His *Honor* observed, that, on general recollection, he considered it as a settled point ; but he would consider the cases referred to, and, on the next sitting of the Court, he gave Judgment accordingly.]

The MASTER of the ROLLS :

Feb. 7.

I before said, that, upon general recollection, I considered this question to be perfectly settled, although I had never had occasion to look into the authorities with a view to determine it. Upon examination of those authorities, it appears that no point can be more completely at rest.

I think it may be stated generally, that in all cases where the costs have been taxed previous to the abatement, there is a right to revive merely for the purpose of having them paid. But that there is a right to revive, where, after taxation of costs, an abatement is caused by the death of the party in whose favour the costs were decreed, is a point on which, for a great number of years, it has not been attempted to raise a question, or even to suggest a doubt. It has been assumed in every judgment, and conceded in every argument ; and the struggle has only been, either, on the one hand, to confine it to an abatement by the death of the party who was to receive costs, or, on the other, to extend it to cases where there had been no taxation.

In *White v. Hayward* (a), Lord Hardwicke treats it as a perfectly clear point, and says it had been de-

(a) 2 Ves. 461.

terminated by himself ten years before, and also by Sir *Joseph Jekyll*, which must have been at a still earlier period. In *Johnson v. Peck* (a), *Blower v. Morrett* (b), and *Kemp v. Mackrell* (c), he uniformly refers to the distinction between costs taxed and untaxed; and the question with him was, not whether there be a right to revive where costs are taxed; (for upon that no doubt was entertained;) but whether there ought not to be a revivor for costs decreed, although an abatement happened before taxation. In *Hall v. Smith* (d), the attempt was to distinguish between the case of an abatement by the death of the party who was to receive, and that of an abatement by the death of him who was to pay the costs; and thus the very argument admitted the rule, that in the former case there might be a revivor.

1817.
LOWTEN
v.
THE MAYOR,
&c. OF
COLCHESTER.

The case of *Morgan v. Scudamore* (e), is an authority for more than the present Plaintiff has occasion to contend. There, the Master having settled the amount of the costs, but not having made his Report previous to the abatement, Lord *Rosslyn* at first doubted whether he should not order the Report to be entered *nunc protunc*; and, on the question coming a second time before him, he seems to have taken a broader ground, and to have thought taxation not absolutely necessary to entitle a party to revive. In *Thorne v. Pitt* (f), which came before Lord *King* in 1725, the Bill had been dismissed with costs, which were taxed; and a demurrer to the bill of revivor was allowed, on the

Held, no Re-
vivor for costs
except after
Decree to ac-
count; but
since overruled.

- (a) 2 Ves. 465. (e) 2 Ves. jun. 313. 3 Ves. 812.
(b) 1 Dick. 254. 195.
(c) 2 Ves. 579. 3 Atk. (f) Sel. Ch. Ca. Temp.
King. 54.
(d) 1 Bro. Ch. Ca. 438.
2 Dick. 649.

1817.

ADDIS

v.

KNIGHT.

partners were in the habit of drawing bills upon the Plaintiff for their accommodation, which bills the Plaintiff always accepted, without any valuable consideration, on the credit (as he alleged) of his father-in-law, and in the confidence that he could set off at any time to the amount of his bond.

Joshua Knight died in *June*, 1809, having made his will, and appointed the three Defendants his executors, who proved the same.

On the 23d of the same month, a commission issued against the Defendant *Edward Knight*, as surviving partner; under which he was declared bankrupt, and an assignment made of his separate estate, and also of the partnership estate.

At the time of *Joshua's* death, and of the commission issued, the partnership was indebted to the Plaintiff £8029 in respect of his acceptances, of which £5983 13s. was discounted at the Bank, and the remaining £2045 7s. paid away by the partnership, the whole of which the Plaintiff was then liable to pay, and afterwards actually paid, to the holders of those bills upon application made to him.

The Plaintiff proved the £2045 7s. under the commission on the joint estate; and the Bank were admitted to prove in joint exoneration of the Plaintiff's liability upon the several other acceptances, to the amount of £5983 13s. Dividends were received on both proofs, by which the sum proved by the Plaintiff was reduced to £1840 15s. 6d., and that proved by the Bank to £5385 6s. 10d. amounting in all to £7226 5s. 4d., remaining due to the Plaintiff from the partnership.

The joint estate being insufficient to pay any further dividend, the Assignees under the Commission filed a Bill, on behalf of themselves and all other the joint creditors of the partnership who should come in and contribute, against the present Defendants as executors, and other persons having beneficial interests under the will of *Joshua Knight*, claiming (among other things,) to be paid the remainder of their debts out of the real and personal estate of the Testator, after payment of his separate creditors, and calling upon them to account for the same.

1817.

 ADDIS
 v.
 KNIGHT.

By the Decree at the Rolls, on the 26th of *January*, 1812, it was referred to the Master to take an account of the partnership debts, and it was ordered that the residue of the Testator's personal estate, after payment of his separate debts, should be applied in payment of such partnership debts as should remain unsatisfied after applying the whole partnership estate in liquidation thereof, and, in case the personal estate should prove insufficient, then the Testator's real estate was declared to be liable, under the statute (a), to make good the deficiency, and an account thereof was also directed.

Under this Decree, the Plaintiff proved before the Master the balance of £1840 15s. 6d. remaining due on his proof under the commission; but, depending upon the Bank for carrying in before the Master the £5385-6s. 10d., which was the balance due on the unsatisfied acceptances, in further exoneration of his liability, confined his proof to the former sum, and was called upon by the Bank to pay, and had since actually paid, the amount of those acceptances.

(a) 47 Geo. 3. " for the more effectually securing the payment of traders' debts."

1817.



Annis

v.

Knight.

it is quite clear that, as at Law a joint cannot be set off against a separate demand, the same rule prevails in Equity, and must continue to prevail so long as the present system, in regard to joint and separate estates, subsists.

The case of *Ex parte Quintin* (a), may be considered as an exception ; but in *Ex parte Twogood* (b), the present Lord Chancellor expresses his disapprobation of that decision.

It is difficult to discover what was the precise equity sought in the case of *Stephenson v. Chiswell*. The Plaintiffs there claimed to retain their own debt until they should be divested of it by somebody having a better right to it than themselves. But it is difficult to say what they would have considered a better equity than their own. Lord *Rosslyn*, it is true, uses some expressions which appear to be in favour of the present application ; but the demurrer was to the whole relief sought, and its being allowed, was a refusal of that relief in any part and to any extent.

According to the scope of the argument, there would be hardly any rule by which the right of set-off can be ascertained. The criterion of set-off is supposed to be the purpose to which the debt is intended to be applied ; since, if it is wanted for the payment of separate creditors, the Plaintiff does not pretend any right to retain ; he claims to be entitled only in respect of its intended application to the payment of joint creditors. But he is not called upon to pay this debt, in the same character in which he would receive, as a joint creditor. His right is not co-extensive with his obligation. His obligation is to pay the whole ; his

(a) 3 Ves. 248.

(b) 11 Ves. 517—519.

right is to receive only a part; namely, his proportionate dividend with the other joint creditors.

Bill dismissed with costs. (a)

[Reg. Lib. A. 1816. fo. 642.]

(a) See *Deraynes v. Noble*, *Sleech's case*. *Ante*, vol. i. p. 563.

1812.
ADDIS
v.
KNIGHT.

SMITH v. GARLAND.

ROLLS.
Feb. 18—20.

BY agreement in writing, signed by both parties, *Smith* contracted to sell, and *Garland* to purchase, an estate, which was freehold of inheritance, in consideration of £1700, to be paid on executing the conveyance. The Bill was for a specific performance of this agreement by the Defendant the purchaser. The answer set up by way of defence that, after the agreement was entered into, and before the delivery of the abstract, the Defendant was informed that a good title could not be made, by reason of a settlement of which no notice was contained in the abstract. By Decree, 6th August, 1814, it was referred to the Master to enquire and state whether the Plaintiff could make a good title; and the Master reported that a good title could be made.

A Court of Equity will not assist a vendor in defeating a prior voluntary settlement made by himself.

Purchaser objecting to title on the ground of a voluntary settlement made by the vendor; a Bill for specific performance by the vendor was dismissed, and an exception to the Master's Report approving the title allowed.

On Exceptions to the Master's Report, the principal point was, that by indentures dated the 15th and 16th June, 1810, made after marriage, in consideration of the natural love and affection which he bore to his wife and four children, and for settling the estates to the uses therein-after mentioned, and in consideration of 10s. paid by the lessees to uses, " and

1817.

SMITH

v.

GARLAND.

for other considerations," the Plaintiff appointed, granted, and released, the estate in question to the use of himself for life, with remainder to the use of his wife for life; with remainder (as to part) to his eldest son in fee; and as to another part, to his second son in fee; and as to a third part, to his eldest daughter in fee; and as to the residue, to his youngest daughter in fee; with a proviso for survivorship, and with powers to the father to appoint other uses among his children, and to make exchanges. The ground of exception was, that the Plaintiff could not make a good title, by reason that the settlement was in all events binding on him the Plaintiff, as Settlor, and precluded him from selling the estate in question; that as a valuable consideration might thereafter be shown, it might defeat the purchaser's title if ever he had concurred with the Plaintiff in avoiding the settlement, under the statute; and that the Court will not assist a seller in defeating a voluntary settlement made by himself.

Benyon and Sugden, in support of the Exception.

It is too late to say that a mere voluntary settlement is not void against a purchaser, even with notice; but, although the settlement is apparently voluntary, it is still open to proof of a valuable consideration having been given.—*Rex v. Inhabitants of Scammonden* (a),—and it was the opinion of Lord Kenyon, which has since been generally acted upon by conveyancers, that a purchaser ought not to be compelled to accept a title so circumstanced. But

(a) 3 T. R. 474. *Rex v.* 133. A voluntary deed may become good by matter *ex post facto*. *Sdg. Vendors and Purchasers*, 642.
the Inhabitants of Lainden, 3 T. R. 379. And see *Ferrers v. Cherry*, 2 Vern. 384
Prodgers v. Langham, 1 Sid.

will a Court of Equity, in any case, assist the Settlor himself in defeating his own voluntary settlement? The settlement is binding on him who made it; and, so far from stepping out of its way to defeat, the Court will interpose to compel the execution of it, in favour of a meritorious object. *Vernon v. Vernon* (a), *Goring v. Nash* (b), *Newstead v. Searles* (c), *Burke v. Dawson*. (d) The case of *Evelyn v. Temple* (e) is not an authority against us, as it only decides that a purchaser, though with notice, is not bound to see to the application of the money; not that the Children (who were the objects of the settlement) might not have maintained a suit against the Settlor. See also *Leack v. Dean*. (f) A voluntary deed may be made good by many subsequent acts, both of the Settlor and of the object of the settlement; and *Rodgers v. Langham* (g) has been followed and extended in many later cases. *Brown v. Carter* (h), *George v. Milbanke*. (i) If the claimants under the settlement had mortgaged the property, that would have made it good; and here, as it is a reversionary interest, it is extremely probable that it may have been mortgaged; and it is a fact which the purchaser has no means of ascertaining.

1817.
SMITH
v.
GARLAND:

Hart and Heald, for the Master's Report.

A volunteer would not be allowed, as against a purchaser, to set up a settlement by matter arising

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| (a) 2 P. W. 594. | see 18 Ves. jun. 91. where the |
| (b) 3 Atk. 186. | Lord Chancellor observes, |
| (c) 1 Atk. 265. | that the printed Reports are |
| (d) Sugd. Vendors and | very imperfect. |
| Purchasers, 547. Reg. Lib. | (f) 1 Cha. Rep. 78, |
| 1804.fo.1218.A. See <i>Stoane</i> | (g) 1 Sid. 133. |
| <i>v. Cadogan</i> , Sugd. Vendors | (h) 1 Ves. 862. |
| and Purchasers, App. No. 22. | (i) 9 Ves. 190, |
| (e) 2 Bro. C. C. 148. And | |

1817.

SMITH

v.

GARLAND.

ex post facto; and there was sufficient evidence before the Master that there existed no valuable consideration for the settlement. There is no distinction between a settlement without any consideration and where the consideration is merely meritorious. *Doe v. Manning* (a). In *Ferrars v. Cherry* (b), the purchaser was put upon an enquiry, whether there had been articles prior to the marriage; and Lord *Hardwicke*, in observing upon that case, says, the Reporter was mistaken—that he inclined to think it was left uncertain on the face of the settlement, whether it was made before marriage or not; and he denied its authority (c). In *Buckle v. Mitchell* (d), the contract had been made with the express view of getting rid of the settlement; and there was a meritorious consideration for the settlement; but a specific performance was decreed. In this case, the Plaintiff does not come into Court to set aside the settlement. He has no occasion to do so, the settlement being absolutely void by the statute.

[*The MASTER of the ROLLS*. Only as against purchasers for valuable consideration.] (e)

To set up this deed as a ground for non-performance of the agreement to purchase, would be to defeat creditors of a security which they have a right to rely on; and that was the principle of the *MS.* case in the Exchequer, cited in *Doe v. Manning* (f).

The MASTER of the ROLLS (stopping the reply):

The cases referred to are cases in which the pur-

(a) 9 East, 59.

(b) 2 Vern. 384.

(c) In *Senhouse v. Earle*, Amb. 289. But see *Sugden's Vendors and Purchasers*, 544.

(d) 18 Ves. 100. *Met-*

calfe v. Pulvertoft, 1 Ves. and B. 180.

(e) Stat. 27 Eliz. c. 4.

(f) *Standon v. Charlwood*, 9 East, 64, 70.

chaser was Plaintiff, and are altogether different from a case where the Settlor comes into this Court for the purpose of defeating his own settlement. A purchaser has in Equity the same rights as at Law, under the statute; and the voluntary settlement, as against him, cannot stand. But the party who made the settlement has no right to disturb it. As against himself, it is valid and binding. A Court of Equity remains neutral with respect to it. It will not impede the sale by which he seeks to get rid of it, as was decided by *The LORD CHANCELLOR* in the case of *Pulvertoft v. Pulvertoft (a)*; but neither will it assist him. It will not interfere in any manner respecting it.

1817.
SMITH
v.
GARLAND.

In this case, there is no party before the Court who is an object of the provisions of the statute. The vendor is not within the contemplation of the statute. The purchaser might claim the benefit of it; but he does not—he repudiates it. As between the Settlor, and the objects of the settlement, it is a perfectly binding settlement; and the Plaintiff has no ground whatever for the relief he prays.

[Exception allowed. Bill dismissed, without costs.]

Reg. Lib. B. 834.

(a) 18 Ves. 84.

1817.

ROLLS.

Feb. 29.

ROWLEY v. EYTON.

Testator by Will charges all his estates with payment of debts, and makes his son residuary devisee; afterwards purchases copyholds which are duly surrendered to the use of his will, and by codicil devises those copyholds to his son in fee.

The codicil held a republication of the will so as to subject those copyholds to the payment of debts.

THOMAS EYTON made his Will, duly executed to pass real estates, in the words following:—" I order and direct that all my just debts and funeral expences shall be in the first place paid and discharged, and with the payment thereof I charge all my real and personal estate. I appoint my son *Thomas Eyton* sole executor of this my will, and I give and bequeath unto my said son all the residue of my estate and property both real and personal over which I have any disposing power."

After making his will, the Testator purchased several copyhold estates held of the manor of *Wrockwardine*, which he surrendered " to such uses as he should by will or any codicil thereto appoint;" and he subsequently made a codicil to his will, also duly executed to pass real estates, in the words following: " I hereby give, devise, and bequeath unto my son *Thomas Eyton* and his heirs for ever, all my copyhold estates within the manor of *Wrockwardine*."

The Testator died after making this codicil, leaving his son *Thomas Eyton* his heir at law, and heir according to the custom of the manor.


A Creditors' Bill was filed against *Thomas Eyton* the son, to make the after-purchased copyholds subject to the payment of the Testator's debts.

The question was, whether the codicil was a republication of the will.

Sir *S. Romilly* and *Harrison*, for the Plaintiff.

Benyon and *Heys* for the Defendant,

Contended, that the after-purchased estates being specifically devised by the codicil, made it a case of exception from the general rule. *Barnes v. Crowe* (a), *Pigott v. Waller* (b), and *Goodtitle v. Meredith* (c), were cited.

1817,

 ROWLEY
 v.
 EYTON.

The MASTER of the ROLLS, without hearing the reply, decided that the codicil was a republication of the will, so as to make the after-purchased estates subject to the devise for payment of debts; and he decreed accordingly.

[Reg. Lib. 1816. fo. 690.]

(a) 1 Ves. jun. 486. 4	(c) 2 M. & S. 5. And see
Bro. C. C. 2.	<i>Hubne v. Heygate</i> , ante, vol.
(b) 7 Ves. 98.	i. 286.

1817.

ROLLS.

Feb. 25. 27. 28.

MASSEY v. HUDSON.

Devise of an estate, charged with two several Legacies to *A.* and *B.*; and in case *A.* or *B.* die without lawful issue, then the whole of the said two legacies to go to the survivor, his executors, &c. *A.* dies without issue in the Testator's life-time. Held, the Legacy lapsed, the contingency on which it was given over being too remote.

Quære, if

it had been to the survivor only, and not to his executors, &c. in which case it seems that the survivor might have taken, as a personal benefit the failure of issue being construed to be restricted to a dying without issue in his life-time.

Quære, also, if the limitation over had been immediate on the death; in which case it seems that it would have vested in the survivor, and not have lapsed by the death of *A.* in the Testator's life-time.

£300 to *A.* to be paid to him, his executors, &c. within 12 months after the death of *B.* in case *B.* shall happen to survive my wife. The latter words construed with reference only to the time of payment, and not to make void the legacy, *B.* having died in the life-time of the Testator's wife.

THOMAS WILKINSON devised to his wife for life, and after her death to *John Power*, in fee, charged with an annuity of £26 to *Elizabeth Power*, for life; "subject also to and chargeable with the following payments, i. e. £300 to *Edward Power*, to be paid to him, his executors, administrators, or assigns, within twelve months after the death of *Elizabeth*, in case she shall happen to survive my wife, with interest at £4 per cent. from the death of the said *Elizabeth*; and the further sum of £300 to *Virginia Power*, to be paid to her, her executors, administrators, or assigns, within twelve months after the decease of *Elizabeth*, in case the said *Elizabeth* shall happen to survive my wife, with interest at £4 per cent. from the death of the said *Elizabeth*. And I do hereby order and direct, that in case the said *Edward Power* or *Virginia Power*, shall die without lawful issue, then the whole of the said several sums of £300 and £300 shall go and be paid unto the survivor of them, his or her executors, administrators, or assigns." And he appointed his wife executrix.

Edward Power died in the Testator's life-time, leaving a widow, but no issue. *Elizabeth Power* also died in the Testator's life-time.

1817.

MASSEY
 v.
HUDSON.

Virginia Power survived the Testator, and married *Massey*, who died in his wife's life-time, intestate as to the two legacies of £300 and £800. His widow late *Virginia Power*, died in 1803, (leaving the Testator's widow,) and left issue, the Plaintiff, to whom she bequeathed all her property, and appointed the Defendant *Hudson*, her executor.

John Power, the reversioner named in the will, also died in the life-time of the Testator's widow; upon whose death, in 1812, *Hudson*, (the executor of *Virginia Power*), purchased the estate which was charged by the will of the Testator with these several payments.

As to the construction of the will, it was contended on the part of the Plaintiff, that the words, "in case, *Elizabeth* shall survive my wife," did not constitute the condition on which the legacies were to become payable; but only related to the time of payment; which was in that event, to be postponed to the end of a twelvemonth after the decease of *Elizabeth*. And this construction was held by *His Honor* to be clearly right, stopping the reply on that point.

The other question was as to the legacy to *Edward Power*; whether it lapsed by the death of *Edward* in the Testator's life-time, or passed to *Virginia* by virtue of the clause of survivorship.

Bell and Heald for the Plaintiff.

The objection is, that this legacy lapsed, by the

1817.

Massey

v.

Henson.

death of *Edward Power* in the Testator's life-time. But, where a legacy is given to one for life, with remainders over, or legacies, as in this case, to two, with benefit of survivorship, the death of the first taker, or of one of the two legatees, in the life-time of the Testator, will not defeat the interest of the remainder-man or survivor. *Willing v. Bayne* (a), *Ledsome v. Hickman* (b), *Perkins v. Micklethwayte* (c). Therefore, *Edward* having died without issue in the Testator's life-time, the legacy intended for *Edward* vested in *Virginia* as the survivor, unless the limitation itself should be considered as void, the legacy being given over on an indefinite failure of issue. But as to that, see *Hughes v. Sayer* (d), *Nicholls v. Skinner* (e), *King v. Withers* (f), and *Barlow v. Satter* (g).

Sir *S. Romilly*, and *Shadwell*, for the Defendant.

Supposing the legacies to have vested, the limitation over is void as being too remote. If the will had stopped at the word "survivor," it would fall within some of the cases which have established an exception to the general rule. But here it is, "to the survivor, his or her executors, administrators, or assigns," which excludes the idea of a *personal* benefit, and necessarily extends it to an indefinite failure of issue. In *Nicholls v. Skinner*, where the words were "to the survivor and his heirs," and which would therefore be a case in point for the Plaintiff, supposing it to be a complete authority, the distinction created by these words does not appear to have been adverted to in the argument, and the decision is on a ground which appears to be wholly inconsis-

(a) 3 P. W. 113.

(d) 1 P. W. 634.

(b) 2 Vern. 611. 3 P. W.

(e) Pre. Cha. 528.

114. n.

(f) Forr. 117.

(c) 1 P. W. 274.

(g) 17 Ves. 479.

CASES IN CHANCERY.

tent; besides which, the report of the case is extremely imperfect.

The reasoning in *Hughes v. Sayer* is directly at variance with the Plaintiff's claim; going on the personal enjoyment intended for the survivor, which he could not have had unless he were alive at the time of the contingency happening. It therefore establishes the very distinction which in this case would operate to exclude the Plaintiff. In *Beauclerk v. Dormer (a)*, Lord Hardwicke held the gift over to be void, the words of limitation not being suffered to restrain the general construction of a dying without issue, to an indefinite failure of issue. There indeed the limitation over was not to the survivor, but the intention in favour of a particular individual was as strongly marked as if that word had been used.

The MASTER of the ROLLS:

I think the bequest over in this case is too remote. A bequest to A. after the death of B. does not import that A. must himself live to receive the legacy. The interest vests at the death of the Testator, and is transmissible to representatives who will take whenever the event of B.'s death may happen. So, if the bequest be to A. in case B. shall die without issue. If that were allowed to be a good bequest; A.'s representatives would be entitled to take at whatever time the issue might fail. It is for that reason that it is held too remote. But if A. is personally to take the legacy, then the presumption is strong that an indefinite failure of issue could not be in the Testator's contemplation.

Prima facie, a bequest over to the survivor of two persons, after the death of one without issue, fur-

(a) 2 Atk. 306.

1819.
MAGNET
Hudson

1817.

MASSEY

v.

HUDSON.

nishes this presumption; for it will be intended that the survivor was meant individually and personally to enjoy the legacy, and not merely to take a vested interest, which might or might not be accompanied by actual possession. For, if the survivorship be necessary only to vest the interest, and to render it transmissible, the objection of remoteness is not at all obviated, and the restrictive presumption does not arise. Now, the addition of the words "executors, administrators, or assigns," excludes the presumption that it was a mere personal benefit that was intended for the survivor. For, though there should be no such failure of issue as would enable him personally to take, yet his representatives would be entitled to claim in his right whensoever the failure of issue should happen. I cannot, therefore, acquiesce in the decision, as reported, in *Nicholls v. Skinner*, as it is repugnant to the very principle on which it professes to proceed. For, how could it be said that, as the will was worded, it must be a dying without issue in such a manner as that the survivor might take? Try it by this test. Suppose a bequest over after an indefinite failure of issue were good, and that the issue of the person first dying were not to fail for fifty years after the death of the survivor; how could the claim of his representatives at that period be excluded? They would say, Our Testator was the survivor; he therefore took a vested interest in the legacy, and the event has now happened on which it was given to him. Could it be said that the legacy was personal to the individual, and that, if he himself did not live till it could vest in possession, nobody could claim in the character of his representative? The answer would be, that by the express words of the will it is given to him and his representatives. It is therefore not a personal but a transmissible interest, and consequently the ground fails on which alone the words

"dying without issue," could have received a restricted interpretation.

1817.

MASSEY

v.
HUDSON.

Decree for the Defendant to pay to the Plaintiff his costs of the suit. The Plaintiff entitled to the legacy of £300 bequeathed to *Virginia Power*, which was directed to be raised by sale of a sufficient part of the real estate. The legacy to *Edward Power* was declared to have lapsed.

On a following day, *His Honor* said, that on comparing the report of *Nicholls v. Skinner* with the Register's book, he found the case had been wholly misrepresented; it being in the report supposed that one of the children had died, and that the question arose, on the death of that child without issue, as to the interest of the survivors; whereas the true facts of the case were as follows:

March 3.

Reg. Lib. 1719. B. fo. 522.

John Nicholls by his will devised to his three children (whom he named executors,) all his moiety of a certain messuage and tenement, &c. and gave to them his £2800 capital stock in the bank, with the produce thereof, to be equally divided among them, share and share alike, and to be paid to them by his Trustees, (therein named) at their respective ages of twenty-one, or days of marriage; and, if any of them should die before that age or marriage, or if any of them should die without issue; then the share or shares of him or them so dying, to go to the survivors or survivor, and to their heirs; and he appointed the several persons therein named as Trustees and Overseers of his will, upon special trust to receive the said £2800 stock, and the produce thereof, for the uses before-mentioned.

1817.

MASSEY

v.

HUDSON.

The eldest son, on attaining seventeen, proved the will; and having afterwards married, while yet under 21, filed a Bill against the two younger children and the Trustees, insisting that, on the event of his marriage, his share had become payable, and praying an account, and to be paid accordingly.

The Trustees, by their answer, admitted that the Plaintiff was not entitled, until he attained twenty-one, to have the possession or management of any more than the interest of his share; the will directing that, in case of the death of any of the children without issue, his or their share or shares should go to the survivors or survivor.

The Decree was for an account; and that the Plaintiff's share of the rents and profits of the real estate, as well as of the residue of the personal estate, be brought before the Master to be by him placed out at interest on such security as he should approve, for the Plaintiff's benefit, till he should attain twenty-one; the interest thereof, together with the said rents and profits to be paid to him in the mean-time. And, as to the Bank Stock, the same to remain as it then did; and the Plaintiff, on attaining twenty-one, to have one third of the said stock, and the produce thereof.

From this it is evident that the question was raised, as to the survivorship, and that the bequest over on failure of issue was treated as a void bequest; since, on attaining twenty-one, the Plaintiff was to have his third part conveyed to him absolutely. So far, therefore, from clashing with the authorities followed in the present case, it is an additional authority in favour of the decision.

1847.



CHRISTIE v. CRAIG and Others.

Feb. 27.

SIR Samuel Romilly moved, on the part of the Plaintiff, a part-owner, for an injunction to restrain the sailing of a ship, unless upon security given by the Defendants, the other part-owners, to the amount of his share. It appeared that the ship was intended to sail the next day, and the affidavit in support of the motion did not state any circumstances which might have accounted for the Plaintiff's delay in applying; but it was nevertheless urged that, as all the Defendants must be taken to have known of the rule by which part-owners are bound, viz. not to send a ship to sea against the consent of the other part-owners, without giving security, they had no right to object.

Injunction to restrain the sailing of a ship upon the application of a part-owner, refused; where the ship was intended to sail the next day, and it did not appear by the affidavit filed in support of the motion that there were any circumstances to account for the Plaintiff's delay in applying.

The LORD CHANCELLOR, however, said, that the Plaintiff came too late, just as the ship was about to sail; and that he would make no order, at least without knowing what opportunity the party might have had of coming sooner, when he had lain by till after charter-parties were made, exposing the Defendants to the risk of demurrage, and other like consequences.

No Order was made.

1847.

Feb. 28.

MORGAN v. SHAW.

There can be no reference of title, except where the title only is in dispute.

Generally, a purchaser shall not be allowed both to retain possession of the estate and to keep his purchase-money; but in a case where he was willing to give up possession, which he had taken under the agreement, and it was a question whether there was, or not, a subsisting contract, the *Lord Chancellor* refused to order payment of the purchase-money into Court.

THE Bill was for the specific performance of an agreement, dated the 23d of *December*, 1813, for the purchase by the Defendant for £9000 of an estate contracted to be sold by the Plaintiff, "in as large and ample a manner as the same was then occupied by the Plaintiff's tenant; by which the sum of £100 was to be paid immediately by way of deposit; the Plaintiff to deliver an abstract on or before the 1st of *March*, 1814, and to deduce the title at his own expense; and on or before the 24th of *June* following, on receiving from the Defendant the remainder of his purchase-money, to execute, at the costs and charges of the Defendant, a proper conveyance; the Defendant to have possession of part of the premises on the 2d of *February*, and of the remainder on the 1st of *May*, 1814; and it was provided that, if by reason of any obstacle (other than a defect of title, which should not be cured by the vendor on or before the 25th of *December*, 1814,) the purchase was not completed on or before the 24th of *June*, the Defendant should pay interest on his purchase-money from that time—if the purchase was not completed through a defect of title, the Plaintiff to return the deposit—the abstract and agreement to be laid before counsel on the part of vendor and purchaser—and, if such counsel should be of opinion that no good title could be made, the agreement to be void.

The deposit was paid, possession delivered, and the abstract sent to the Defendant, according to the agreement. The abstract was laid before counsel, who were of opinion, that a good title could not be made. The Defendant sent to the Plaintiff notice of

this, and that the agreement was consequently at an end, on the 20th of *December*, 1814.

1817.
MORGAN
v.
SHAW.

The Defendant, by his answer, insisted that it was the intention of the parties to the agreement, in fixing the 25th of *December*, 1814, as the time for completing the title, that the agreement should fail if not in that respect literally fulfilled; and, a good title not having been made by that time, he submitted that he was wholly released from the agreement.

After the Bill was filed, the title was, by the Defendant's consent, again submitted to counsel, but on an express stipulation that, if not approved, the agreement should be cancelled; and, in *May* 1815, a second opinion was given against the title. Subsequently to this, further evidence was furnished, and the Plaintiff filed a supplemental Bill, to which the Defendant put in an answer, insisting on various acts of delay by the Plaintiff in making out his title; that, in allowing a further opinion to be taken, he (the Defendant) had intended only to give reasonable time, and not to keep the contract always on foot; and that, under the circumstances, he was fully justified in refusing to complete the contract.

The Defendant had repeatedly offered, both before and after the second opinion was taken, to give up possession of the estate, and pay a fair rent for the time that he had continued in possession.

The Plaintiff now moved for a reference to the Master, to enquire whether he could make a good title to the estate; and, in case the Defendant should refuse to consent to such reference, then that he might within a month pay the remainder of his purchase-money into Court.

1817.

MORGAN

v.

SHAW.

Hart, in support of the motion.

Sir Samuel Romilly, and Heald, contra,

Contended, that there was no instance of a reference upon title, except where nothing but the title was in dispute; and that, in the present case, it was a question whether there was any subsisting contract. With regard to the payment of the purchase-money into Court, there was no ground for it, if no subsisting contract, and the Defendant not in possession; and they argued that, having offered to deliver up the estate, although the Plaintiff had refused to accept the offer, he could not, for the purpose of such an application, be considered as in possession at all.

The LORD CHANCELLOR:

Taking this case at the highest, as that of a most unwilling purchaser, there is nothing in the terms of the agreement unreasonable or improper, or that ought not to be carried strictly into execution. The rule is quite obstinate, that a reference of title cannot be had except in a case where there is no question but of title; and this must be the rule; for otherwise, we should fall into the absurdity of having the Master's Report upon a title, and a subsequent decision that there is no subsisting agreement. I will not, however, go the length of saying, that there may not be a case of fraudulent allegation sufficiently strong to form an exception to the general rule. The inclination of my opinion is against the old doctrine, that time is in no case of the essence of the contract. In this case, it is contended, that the parties meant it should be so; and that is a question which can only be decided at the hearing of the cause. With regard to the payment of the purchase-money into Court, the rule is, that if the agreement allowed possession to be taken before the purchase is completed, the

mere fact of possession is not a sufficient ground for making the order, without further circumstances. In a case of this sort, where one of the parties insists that the bargain is at an end, it is against conscience that he should be allowed to keep his purchase-money and to retain possession also. But here the Defendant took possession under a persuasion that the contract was capable of being completed; and, while, it remains doubtful whether it cannot still be completed, and whether, if it can, the Defendant is not still bound by it, I cannot order the purchase-money to be paid into Court by a purchaser who is willing to give up possession.

[Motion refused, with costs.]

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JONES v. POWELL.

THIS was a motion by the next friend of an infant Plaintiff, for a reference to the Master to enquire whether the suit he had instituted was for the infant's benefit.

Huddleston, in support of the motion.

Blake, contra.

[*The MASTER of the ROLLS* said, that the next friend, in commencing a suit, undertakes on his own part that the suit he has so commenced is for the benefit of the infant, and that it is not competent for him to apply for a reference to determine the point.

The motion was refused.

1817.

MORGAN
v.
SHAW.

March 3.

[MASTER of
the ROLLS for
the LORD
CHANCELLOR.]

No reference,
upon an appli-
cation by the
next friend of
an Infant, to see
whether a suit
which he him-
self has insti-
tuted is for the
Infant's benefit.

1817.

March 14.

FARNSWORTH v. YEOMANS.

Where the Plaintiff, by an amended Bill, required the Defendant to answer as to certain facts upon the inspection of papers stated to be left by the Plaintiff in the hands of his clerk in Court, the Defendant, having obtained one order for time, was allowed, on affidavit, that the papers were not left for inspection till some time after that order obtained, as much time in addition without prejudice to the usual order on a second application, after that additional time was expired.

FISHER moved, that the Defendant might have three weeks further time to plead answer or demur to the Plaintiff's amended Bill, not demurring alone, without his coming under the usual terms (a), under the following circumstances:—

The amended Bill referred to certain papers, as being then placed in the hands of the Plaintiff's clerk in Court, to the intent that the Defendant might examine the same before he put in his answer, and state if the same had been examined, and answer certain questions relating thereto.

The Defendant appeared, and obtained an order for a month's time to answer, &c. on the 12th of *February*. Previous to the 6th of *March*, he attended at the seat of the Plaintiff's clerk in Court, in order to examine the papers referred to, when the clerk in Court made search for the same, but could not find them; and stated to the Defendant, that they had not been left, which information the Defendant believed to be true. On the 6th of *March*, the Defendant's solicitor received notice from the Plaintiff's solicitor that the papers were lodged in the hands of his clerk in Court.

Upon affidavit of the above facts, and of service of the notice of motion, no person appearing on behalf of

(a) See Lord *Rosslyn's* General Order, 23d *January*, 1794.

"That, on a second application for time to answer an

amended Bill, the Defendant do consent to the terms thereby prescribed." 4 Bro. 544. Beames's Orders, p. 455.

the Plaintiff, *The LORD CHANCELLOR* ordered, that, as the papers were not left till 22 days after the date of the first order for time, the Defendant should have 22 days further time to plead answer or demur, not demurring alone, and that without prejudice to his obtaining the usual order on terms at the expiration of the 22 days aforesaid.

1817.
FARNSWORTH
v.
YEOMANS.

[Reg. Lib. A. 1816. fo. 1184.]



The ATTORNEY-GENERAL, at the Relation of the
MAGISTRATES of BANFF, INFORMANT;
AND
EDWARD STEWART, HELEN BOOTH, and
Others, DEFENDANTS.

ROLLS.
March 11th,
1816.
March 11th,
1817.

JAMES WILSON, by his Will dated 2d July, 1799, directed his executors therein named to dispose of all his property (consisting of real and personal)

The Statute of Mortmain, 9 Geo. 2. cap. 1. does not extend to the island of

Grenada, in the *West Indies*; the object of the statute being wholly political; it having grown out of local circumstances, and being intended to have only a local operation.

Donations *inter vivos* in Mortmain are not prohibited by the statute, but regulated; the statute requiring enrollment in the Court of Chancery; by which is meant the Court of Chancery, in *England*, where there is an ancient office for the enrollment of deeds; and there being no enrollment offices annexed to the Courts of Chancery in the colonies.

Regularly, all questions of title to land in the colonies are to be decided, in the first instance, by Courts of local judicature, from which an appeal lies to the King in Council.

1817.

ATTORNEY-
GENERAL
v.
STEWART.

at *Grenada*, and to remit the net proceeds to *Nesbitt* and *Stewart*, in *London*, to be by them invested in the funds, and (after the death of certain persons therein named, who were to enjoy the interest for their respective lives,) the whole stock to be drawn again out of the funds, and remitted to the Magistrates of *Banff*, in *North Britain*, to be by them laid out as a charitable fund in the best manner possible, and to remain under the directions of the acting magistrates from year to year.

By an Order made on the hearing of the cause, it was referred to the Master to enquire and state whether, according to the laws of *Grenada* in force on the 4th of *October*, 1799, (the date of the testator's death,) real estates situate in the said island might be devised to charitable uses.

The Master, by his Report, certified the following facts :—

By the definitive Treaty of Peace, signed on the 10th of *February*, 1763, the island (having been previously captured) was ceded and guaranteed to *Great Britain*.

The King's Proclamation, dated the 9th of *October*, 1763, after reciting that the *American* territories secured to the Crown of *Great Britain* by the said treaty had been erected into four separate Governments, one of which included *Grenada*; and that it would greatly contribute to the speedy settling of the said new Governments, that his Majesty's subjects should be informed of his paternal care for securing the liberties and properties of those who were or should become inhabitants thereof, His Majesty had, in the letters patent by which the said Governments were constituted, given express power and direction to the respective governors of the said colonies that, as soon as the state and circumstances of the said

colonies would admit, they should, with the advice and consent of the members of the Council, summon general assemblies within their respective Governments as therein mentioned, with power to the said Governors, with the consent of the council and representatives of the people to be so summoned, to make and ordain laws, statutes, and ordinances for the public peace and welfare of the said colonies, as near as might be agreeable to the laws of *England*, and under such regulations and restrictions as were used in other colonies ; and, in the mean time, and until such assemblies could be called, all persons inhabiting in, or resorting to, the said colonies, were to confide in the royal protection for the enjoyment of the benefit of the laws of *England*, for which purpose power was given under the Great Seal, to the Governors of the said colonies, with the advice of the Council, to erect courts of judicature within the colonies for hearing and determining all causes, as well criminal as civil, according to law and equity, and as near as might be agreeable to the law of *England*, with liberty of appeal to the King in Council (a).

1817.

ATTORNEY-
GENERAL
v.
STEWART.

In pursuance of this proclamation, legislative assemblies were from time to time convened in the government of which the island of *Grenada* formed part, and several acts passed thereby ; by one of which, dated the 20th of *February*, 1770 (b), after reciting that doubts

(a) See the facts relative to the establishment and political condition of *Grenada* as a *British* colony, in the report of the case of *Campbell v. Hall*, 1 Dougl. 204.

(b) Entitled, " An Act to extend an Act of Parliament

made in the reign of the late King *Charles* the Second, entitled, *An Act for the prevention of frauds and perjuries, to Grenada and the Grenadines*, and to enforce the same.

See *Smith's* collection of

1817.
 ATTORNEY-
 GENERAL
 v.
 STEWART.

had arisen whether the Statute of Frauds (29 Car. 2.) extended to the islands of *Grenada* and the *Grenadines*, it was (to the end that such doubts might be entirely removed, and the law settled and known) enacted, that the said statute, except where the same was altered, or it was otherwise provided for by any acts of the said islands then in force, should be extended to and adjudged to be in force in the aforesaid islands. But it did not appear to the Master that any act had ever been passed by the Legislative Assembly of the said islands, or the government including the same, adopting, repealing, altering, or in any manner relating to, the act of the 9th *George* 2d, (commonly called the Mortmain Act,) except as the same was or might be included in the general words of the act next mentioned.

The islands were captured by the *French* in 1779, and restored to *Great Britain* at the peace of 1783; and, on the 16th of *March*, 1784, an act (a) was passed by the Legislative Assembly of the Government, entitled, "An act for removing doubts respecting the laws which are to be deemed in force in these islands upon their restitution to the Crown of *Great Britain*," whereby, after reciting that the said islands were taken by the arms of His Most Christian Majesty, on the 4th of *July*, 1779, and the *French* laws and Government established therein, and continued until the said islands were restored to *Great Britain*; and that doubts might arise whether, and how far, the laws which were in force at the time of the capture were


the Laws of *Grenada* (4to. 1808), p. 28. No. 13.

Mr. *Smith* was chief justice of *Grenada*, and by an act of Assembly, passed in *March*, 1809, a printed copy of this

book is declared "to be legal evidence in all courts within the islands."

(a) Vide *Smith's Laws of Grenada*, p. 72. No. 26.

absolutely annihilated, or only suspended, during the continuance of the war, so as to revive by such restitution; it was enacted that all such parts of the common law of *England*, and all such of the statutes and acts of parliament, as were in force while the islands formed a part of the *British* dominions, should be held equally in force, and so to have been ever since the restitution; and that the said colonial act to extend the statute of frauds and perjuries, and several other colonial acts therein mentioned, should be thereby revived, and be in the same force as before the capture.

1817.

 ATTORNEY-
 GENERAL
 v.
 STEWART.

By another act of the Legislative Assembly (a), passed on the 29th of *April*, 1767, entitled, "An act for establishing and regulating a register's office," (which is one of the acts mentioned to be revived by the foregoing,) it was enacted, that all deeds, conveyances, or other instruments in writing, relating to lands in the said island, should be duly entered and recorded in the register office of the island within the time therein specified after the execution thereof; and if not so registered, to be utterly void, unless lost at sea or otherwise intercepted; and it was further enacted, that no will, devising real estates in the said island, should be in future allowed to be pleaded or admitted as evidence, until duly proved before the governor in chief, or other officer therein named, and recorded in the register's office.

By another act (b), of the 3d of *April*, 1770, entitled, "An Act to explain the former, and which is

(a) *Smith's Laws of Grenada*, p. 18. No. 8.

to the Master, but were not adverted to in his Report.

(b) *Smith's Laws of Grenada*, p. 28. No. 14.

1. *December* 1. 1766. "An Act for regulating the rate of interest," &c. (*Smith*, p. 3.)

Besides the above Acts, the following were pointed out

1817.

 ATTORNEY-
 GENERAL
 v.
 STEWART.

also included in the act of 1784 above mentioned, it was enacted, that all deeds and conveyances made and executed in the island might be registered at any time after the making and executing the same, and should be void against any subsequent purchaser, &c. for valuable consideration, unless registered before the registering of the deed under which such purchaser, &c. should claim; and that all deeds, &c. not executed in the island, and not recorded within the time mentioned in the former act, should be void only against such subsequent purchaser, &c.

Henry Bridgewater, Esquire, late chief justice of the island, by his affidavit laid before the said Master, stated, that the common law of *England*, and (with the exception of the bankrupt laws, and such cases wherein the colonial legislature had enacted provisions of their own) the statute law of *England*, and of *Great Britain*, previous and up to the year 1763, were generally in force and acted upon by the respective courts of judicature in the island, in all cases civil as well as criminal, and that he did not recollect, during his practice in the said courts, any question to have arisen upon or under the Acts for restraining devises in mortmain, but that in his judgment and belief those several Acts (except such as might have passed since 1763) did constitute a part of the law of the island.


2. *December 23d, 1790.*
 "An Act for establishing a Court of Common Pleas, &c."
 Clauses 1, 22, 40, 44, 76, 77, 78. (*Smith*, p. 189.)

3. Another Act of *December 1. 1766*, to oblige merchants to sell flour, &c. by weight or measure. (*Smith*, p. 2.)

4. *November 29th, 1765.*
 To prevent the frequenting of taverns by sailors. (*Smith*, p. 2.)

In neither of the three last mentioned Acts is there any reference to the King's proclamation of *October, 1763*.

Upon consideration whereof, the Master was of opinion that, according to the laws of *Grenada* in force on the 4th of *October*, 1799, real estates situate in the said island could not be devised by will to charitable uses.


1817.

 ATTORNEY-
 GENERAL
 v.
 STEWART.

To this report the relators took an exception, "For that the Master ought to have certified either that by the laws of the island in force at the said period, real estates in the island might be devised to charitable uses, or at least that there was not at that period any law in force within the said island restraining devises of lands to charitable uses, or rendering the same invalid."

Hart and *Horne*, in support of the exception.

The proclamation of 1763, provides for the administration of justice in the island, only, "as near as might be," according to the law of *England*, and until the meeting of a General Assembly empowered to make laws, &c. for the public peace and welfare of the colony, also, "as near as might be," to the law of the mother-country. From this, it is plain that it was never meant that *all* the laws of *England* were to be adopted in *Grenada*; and the only sound distinction to be made, is between such as are founded in general, and in local policy. The interpretation of the authority vested in the Assembly is, that they are to enact laws, as near as might be to the laws of *England*, consistently with the particular interests of the colony.

It is not easy to discover on what the Master has founded his Report. If on the opinion of *Mr. Bridgewater*, it is too much to have admitted such an inference on the mere judgement of an individual whose experience appears to be very limited. He considers the law of *England* as in force in the colony, only with the exception of the bankrupt laws—that is,

1817.

 ATTORNEY-
 GENERAL
 v.
 STEWART.

his experience had taught him that the bankrupt laws do not extend to the island, and he produces this exception as the only one then occurring within the limits of his own actual knowledge. But if he had been more closely examined, or questioned *viva voce*, other instances must have occurred—enough to show that the law of the mother-country extends to the colony only so far as is convenient. Would he have found that the law of tithes, with all its particular exemptions—that the poor laws—that the rule prohibiting two persons being in partnership from underwriting the same policy of insurance—were in force there? So, with regard to the Mortmain Act (a). It is quite clear that it is a local statute; it is in terms expressed to be so. The legislature found the grievance complained of to operate in *England* only, and therefore specially excluded *Scotland* from the operation of it, and, even in *England*, excepted the great schools and universities.

Then, considering the mode in which the colony has been dealt with, it will appear that it never was in the contemplation of the colonial legislature to adopt the entire law of *England*. Suppose that *England* were occupied by a foreign force, the moment that force is expelled, the old laws would revive without the necessity of new enactments. In point of fact, it was thought necessary, at the restoration, to give force to the acts passed during *Cromwell's* usurpation by positive law; but nobody ever dreamed of an act to restore the laws which were in existence before the usurpation. Now, how did the case stand with respect to the island of *Grenada* after the expulsion of the *French*? An Act of Assembly was immediately passed, “for removing doubts with respect to the laws which were to be

deemed in force at the restitution." The necessary inference is, that it was not thought the whole *English* law was in force in the island. And then the Act goes on to recite several statutes as being specially revived.

1817.
ATTORNEY-
GENERAL
v.
STEWART.

[*The MASTER of the ROLLS,*

Do you mean to say, that there is no law in *Grenada* but what is founded on the Acts of the colonial legislature ?]

No—We do not dispute that, according to the spirit of the royal proclamation, the island is to be governed by the general principles of the law of *England*, independently of any particular enactments of its own assembly. But, where the legislature of this country has thought fit, by statute, to restrict the common law, we apprehend that the colonies must be especially named in such statute, or else the statute itself expressly adopted by the colonial legislature, in order to its extending to them.

Another objection is, that the statute of mortmain contains certain provisions which cannot be carried into effect in the colonies, requiring enrolment of certain instruments, in order to their validity, in the enrolment office; and, although the Master's Report seems to proceed on the ground that the colonial Acts for establishing and regulating an office for the registry of deeds have obviated this difficulty, the registration prescribed by those Acts is not an enrolment within the Mortmain Act, nor in any manner intended to apply to it.

Sir *S. Romilly* and *Bell*, for the Master's Report.

This case involves a question of considerable importance, but of no great difficulty.

1817:

ATTORNEY-
GENERAL

v.

STEWART.

First, Do the laws of *England* prevail generally in the island of *Grenada*? The case of *Campbell v. Hall* (a), has fully settled this point, notwithstanding the uncertainty of the terms of the proclamation. When an island is conquered, it becomes at that instant subject to the King's dominion; and here, the proclamation made immediately after the cession, enjoins that until the meeting of a General Assembly, and the enactments of laws by that Assembly for the future government of the island, justice is to be administered according to the law of *England*—that is to say, that until the assembly should think proper to make any variation, and in all respects in which no variation should be made, the law of *England* was to prevail. The law of *England*, therefore, was to continue the law of the island, “as near as might be,” that is, in all cases except where it is merely for local purposes, not only until the meeting of the assembly, but afterwards, until altered by the acts of the assembly. The exception in the case of the bankrupt laws is founded on the peculiar jurisdiction vested in the *Lord Chancellor of England*, and not transmissible otherwise than by some special provision. The other alleged instances of exception are entirely of a local description.

The next question then is, whether the *Mortmain Act* be a law of general policy, or merely local and peculiar to *England*. The only argument in favour of its locality is, that it does not extend to *Scotland*. But why was *Scotland* excepted? Because that part of the island is governed by a system of laws peculiarly its own. It might, besides, have been considered as prejudicial to the interest of its established church, which are especially protected by the *Act of Union*.

[*The MASTER of the ROLLS* :

There is no occasion for any enactments respecting wills in *Scotland*, all dispositions of a testamentary nature there being donations, *inter vivos*.]

1817.

ATTORNEY-
GENERAL

v.

STEWART.

Then, if the exception of one part of the *British dominions* is not enough to render the statute merely local, is there any thing in the policy of the Act itself that should confine its operation to *England*? The preamble recites two principal objects for the enactment — first, to prevent lands from being thrown out of circulation; secondly, to prevent the disinheriting of heirs for motives of superstition. What is there in those objects that is not equally applicable to the *West India* islands as to *England*? Nay, with regard to the first object, it would seem to be of more essential importance there than in *England*; because in those colonies, the land partakes so much more of the nature of mere commercial property. Another reason, in respect of policy, for the operation of the Act being extended to the island, is its having so lately been a *Roman Catholic* colony.

Then, with regard to the question of enrolment, the statute of mortmain only requires it to be effected “in the High Court of Chancery;” and this may apply equally to the Court of Chancery in the colony. The objection, that there is no enrolment office there, is immaterial. The *Lord Chancellor* has the power of directing the mode of making enrolments. The enrolment office here appears to have originally constituted a part of the court itself, which is, for some purposes, a court of record. [Mr. *Bell* said, that he had lately had occasion to look into the circumstances of the origin of this office, and, though it was involved in some degree of obscurity, he believed this to be the true state of the case.]

1817.
 ATTORNEY-
 GENERAL
 v.
 STEWART.

The exceptions in favour of schools and colleges still less prove the local operations of the statute; these being institutions of a peculiar nature, nothing analogous to which exists in the island of *Grenada*. Neither do the Acts of the colonial legislature, referred to as extending the operation of particular statutes to the colony, at all go the length of showing that no part of our statute law is in force there, unless it be specially extended. The Act of the 20th of *February, 1770*, does not *enact* the extension of the statute of frauds to the island; but it recites that doubts had arisen, and must be taken as *declaring* the law to be so.

[*The MASTER of the ROLLS,*

I observe that the proclamation gives an authority to the governor of the colony to establish courts of judicature.]

Hart, in reply.

To establish but not to regulate. That is left to the Assembly.

There is a general principle of the law of *England* applicable to its colonies — that whenever a new colony is *planted*, the law of the mother-country prevails, so far as it is applicable to the condition of the colony. But this was a *conquered* colony, and depended entirely for the laws by which it was to be governed on the King's proclamation. This proclamation establishes a separate legislature for the colony, and makes, in the mean while, only a temporary, *ad interim*, provision for the administration of justice. A great portion of the law of this country is of universal application: but other portions are merely municipal and of local importance. The line between them, in the absence of positive enactments, can on-

ly be drawn by the good sense of the judge in every instance that calls for his decision. How could it ever have been a matter of doubt whether the *policy* of the statute of frauds extended to the colonies. The mere recital of such a doubt existing is plain proof that the legislature of the island did not consider the rule as of universal adoption; and this was within seven years after the island first became *British* colony. The Act of the legislature for removing those doubts contains in itself a specific enactment. It is not, as Mr. *Bridgewater* apprehends it to be, the proof of an universal proposition, with a single exception. If the law of mortmain were of general policy, and if such dispositions of property in *Scotland* must be by donation *inter vivos*, and not by will, why was not the statute made to comprehend donations *inter vivos*? That it was not so, is a proof that it was judged not to be convenient for *Scotland*. The reasons assigned are applicable to all parts of the *British* dominions alike. It is not less mischievous to the public that a *Scotch*, than that an *English* heir should be disinherited. Why, then, was the act not extended to *Scotland*? Because it was meant to correct a practical local mischief, which was felt in one part of the island, and not in the other. Mr. *Bridgewater* does not recollect an instance of a devise to charitable uses in the island of *Grenada*. This goes to explain why there was no necessity for extending the law to that island.

Then, in what manner is a grant in the colonies to be made capable of enrolment? The Court of Chancery here has an enrolment office incident to it, and an officer to enrol, with authority to demand fees, and to make his own acts available. How this office was first created does not appear. It is a mere assumption of fact that the *Lord Chancellor* has such power as is attributed to him, with respect to it,

1817.

ATTORNEY-
GENERAL
v.
STEWART.

1817.

ATTORNEY-
GENERAL

v.
STEWART.

[*The MASTER of the ROLLS,*

Is there no such thing as enrolment of deeds in the colonies ?]

Hart. There are offices for the registration of deeds created (in this instance) by the acts of the island-legislature, which are noticed in the Master's Report. But the registration there made is only for the purpose of giving notice to purchasers and incumbrancers, and extends no further (*a*).

March 11.


1817.

The MASTER of the ROLLS :

The question in this case is, whether a real estate, or the money produced by the sale of a real estate, situated in the island of *Grenada*, can be legally devised to a charitable use. That is a question, with respect to which no Court in this country has any direct original jurisdiction. All titles to land are, regularly to be decided upon, in the first instance, by the courts of local judicature, from whose decision an appeal lies to His Majesty in Council. In the present case, however, it becomes incidentally necessary to decide the question here ; there being a fund in Court which is the produce of real estates in *Grenada*, and

(*a*) In *Rex v. Vaughan*, 4 Burr. 2500. Lord *Mansfield* says, " The argument is strong, that certain statutes do not extend to *Jamaica*, though enacted long before that island belonged to the crown of *England*. If *Jamaica* was a conquest, they would retain their old laws till the conqueror thought fit to alter them. If a colony, these statutes are positive regulations of justice, not adapted to the circumstances of new colonies, and therefore no part of that law of *England* which every colony from necessity is supposed to carry with them at their first plantation. No Act made after a colony is planted is construed to extend to it without express words, shewing the intention of the legislature to be that it should."

which must be differently disposed of, according as the devise shall or shall not be held to be valid. It was therefore referred to the Master to enquire and state to the Court, whether, according to the laws of the island of *Grenada*, in force at the time of the Testator's death, real estates situated in that island might be devised to charitable uses. The Master, as I have reason to believe, had much doubt upon the question, but ultimately reported his opinion to be, that such estates could not be so devised.

1817.

 ATTORNEY-
 GENERAL
 v.
 STEWART.

To this Report an Exception has been taken, on the merits of which I am now to determine. It is admitted that there is no particular act of the insular legislature, restraining devises to charitable uses. The assumed ground of the invalidity of such a devise is, that the laws of *England* are in force in the island of *Grenada* and that the statute (a) commonly called the Mortmain Act is, as a part of the law of *England*, also a part of the law of *Grenada*. How the law of *England* became the law of the island of *Grenada* is not distinctly stated. *Grenada* was a conquered colony in which the *French* laws prevailed at the time of the conquest. The King might undoubtedly abrogate these, and substitute the laws of *England* in their place. And it seems to be supposed that this was done by the proclamation of 1763, which is set forth in the report. With regard to three of the four governments to which this proclamation related, viz. *East Florida*, *West Florida* and *Grenada*, I am not aware that any controversy as to the effect of it ever arose. Perhaps there may have been, with respect to them, other acts and instruments more directly expressive of His Majesty's intention to introduce the *English* laws. But as to the fourth, viz. the government of *Quebec*, which was included in the same

(a) 9 Geo. 2.

1817.

ATTORNEY-
GENERAL
v.
STEWART.

proclamation, and where it must have had the same legal effect as in the others, it became a matter of great and long continued discussion, whether the laws of *England* had thereby been generally introduced, in abrogation of the ancient municipal laws of the country. In a Report made by the Attorney and Solicitor-general in 1766, little other effect was ascribed to this proclamation than that of extending to the inhabitants of *Canada* the benefit of the *criminal* law of *England*; and those learned persons were of opinion that the *English* laws relating to the descent, alienation, settlements, and incumbrances of real estates, and to the distribution of personal property in case of intestacy, could not be considered as in force in that country. The question, however, never received any judicial decision.

The case of *Campbell v. Hall* (a), determined nothing as to the effect of the proclamation in introducing the laws of *England* into the island of *Grenada*. All it decided was, that the King, having promised to the inhabitants a local legislature, and having by his commission to the governor authorised the convocation of an assembly, could not afterwards impose a tax on the island, or exercise any legislative authority over it.

But, in whatsoever way the *English* law may have been introduced into *Grenada*, there can be no doubt that it was the received and acknowledged law of the island. For, though there is no Act of Assembly expressly recognising and adopting it, there are Acts which plainly imply that it was considered as having been recognised and adopted. And, in the courts of judicature, it was the *English* and not the *French* law that was administered in civil as well as in criminal cases.

(a) 1 Cowp. 204.

During the *American* war, the island was conquered by the *French*, but it was restored to *Great Britain* at the peace of 1783. After the restitution, an Act was passed by the Assembly, entitled, "An Act for removing doubts respecting the laws which are to be deemed in force," &c. (a) This does not mean that it had ever been ascertained by any Act of Assembly, what particular portions of the common or statute law of *England* were to be received in *Grenada*, but it implies, what was undoubtedly true, that all the laws of *England* were not, and could not possibly be, in force there or in any other colony. What Mr. Justice *Blackstone* says in his Commentaries, with respect to newly settled colonies, is in a great degree applicable to any colony to which the laws of *England* may be extended (b).

1817.
ATTORNEY-
GENERAL
v.
STEWART.

(a) Vide ante, Act 16 Mar. 1784.

(b) His Honor here cited the following passage in his judgment:—

1 Blackst. Comm. Introd. § 4. p. 100.

"It hath been held, that if an uninhabited country be discovered and planted by *English* subjects, all the *English* laws then in being, which are the birthright of every subject (1), are immediately there in force. But this must be understood with very many and very great restrictions. Such colonists carry with them only so much of the *English* law, as is applicable to their own situ-

ation and the condition of an infant colony; such, for instance, as the general rules of inheritance, and of protection from personal injuries. The artificial refinements and distinctions incident to the property of a great and commercial people, the laws of police and revenue, (such especially as are enforced by penalties,) the mode of maintenance for the established clergy, the jurisdiction of spiritual courts, and a multitude of other provisions, are neither necessary nor convenient for them, and therefore are not in force. What shall be admitted, and what rejected, at what times,

(1) 2 P. Wms. 75.

1817.

ATTORNEY-
GENERAL
v.
STEWART.

It is evident that in *Grenada* it was not conceived that the statute law of *England* had any very extensive operation, since it was thought matter of doubt whether even the statute of frauds, general as it is in most of its provisions, made a part of the law of that island; an Act having been passed on purpose to declare it to be in force there.

Whether the statute of mortmain be in force in the island of *Grenada*, will, as it seems to me, depend on this consideration—whether it be a law of local policy adapted solely to the country in which it was made, or a general regulation of property equally applicable to

and under what restrictions, must, in case of dispute, be decided in the first instance, by their own provincial judicature, subject to the revision and control of the King in Council: the whole of their constitution being also liable to be new-modelled and reformed by the general superintending power of the legislature in the mother-country. But in conquered or ceded countries, that have already laws of their own, the King may indeed alter and change those laws; but, till he does actually change them, the ancient laws of the country remain, unless such as are against the law of God, as in the case of an infidel coun-

try (1). Our *American* plantations are principally of this latter sort, being obtained in the last century either by right of conquest and driving out the natives (with what natural justice I shall not at present enquire) or by treaties. And therefore the common law of *England*, as such, has no allowance or authority there; they being no part of the mother-country, but distinct (though dependent) dominions. They are subject however to the control of the Parliament; though (like *Ireland*, *Man*, and the rest) not bound by any Acts of Parliament, unless particularly named."

(1) 7 Rep. 17. *Calvin's case*. Show. Parl. c. 31.

any country in which it is by the rules of *English* law that property is governed. I conceive that the object of the statute of mortmain is wholly political — that it grew out of local circumstances, and was meant to have merely a local operation. It was passed to prevent what was deemed a public mischief, and not to regulate, as between ancestor and heir, the power of devising, or to prescribe, as between grantor and grantee, the forms of alienation. It is incidentally only, and with reference to a particular object, that the exercise of the owner's dominion over his property is abridged.

1817.
ATTORNEY-
GENERAL
v.
STEWART.

It is true that the disinheritance of lawful heirs is rectified as one of the consequences of the unlimited power of devising to charitable uses, and heirs may consequently be benefited by the prohibition. But, generally to restrain the power of devising, was not in the contemplation of the legislature. Heirs are as liable as before to be disinherited by will, provided the disinheritance be not in favour of the proscribed object. The thing to be prevented, was a mischief existing in *England*, and it was by the quality and extent of the mischief, as it there existed, that the propriety of legislative interference upon the subject was to be determined. The statute begins by referring to the ancient laws made against alienations in mortmain. None of the causes in which those laws originated had ever had an existence in the colonies. It then recites, that this public mischief had of late greatly increased. There is locality in that assertion. It was in *England* that the mischief had increased, and in *England* only was it thought necessary to impede its progress. To no other part of the dominions of the crown was this law extended. Yet it was competent to the legislature to have made it the law of every colony belonging to *Great Britain*. I do not believe that it could even now be stated, with

1817.

ATTORNEY-

GENERAL

v.

STEWART.

respect to any of our colonies, that the practice of devising lands to charitable uses has prevailed to any inconvenient extent. In *Jamaica* the wealthiest of our *West Indian* possessions, it has not to this day been thought necessary to guard against any such evil. I do not indeed know that any colonial legislature has made any regulation on the subject, although in none of the old colonies can the mortmain act have any operation. For a long series of years, devises to charitable uses had in this country been wholly unrestrained, and, until they began to grow excessive in their amount, it was not reckoned necessary to restrain them. What the legislature had to consider was, whether, as there was so much of the land of *England* already in mortmain, it was not expedient to lessen the facility of putting more of it into that situation. That was a consideration purely local. It related to land in *England*, and to land in *England* only. The statute contains some exceptions. These exceptions are also local, and still further show the local nature of the law, and how little it can be considered as a general regulation of property.

The two *English* universities, and the three great *English* schools or colleges, are exempted from its operation. This law cannot have the like effect in another country as it has in *England*. There are some *English* objects, in favour of which an *English* testator may devise land in mortmain. But there are no colonial objects in favour of which a colonial testator could so devise. If there were universities or great schools in the colony, this law would not permit a devise to be made to them. If the legislature of a colony were disposed to adopt a similar law, they would surely not transcribe this act, as it stands, into their statute book. They would in all probability specify some useful institution or esta-

blishment of their own, in favour of which they would make such an exemption as is made here in favour of the two universities, and the three schools mentioned in the statute; or, if they did not think it fit to make an exception in favour of their own institutions, they surely would not continue the exception in favour of institutions, of another country. If this law were in force in *Grenada*, the consequence would be, that a Testator could not by will give an acre of land for the support of a school in the island, while he might give his whole estate to augment the endowments of an *English* college.

Then, with respect to alienations in mortmain *inter vivos*, they are not prohibited, but regulated. One of the regulations required, as necessary to their validity, is enrolment in his Majesty's High Court of *Chancery*. This further shows that the act is throughout local, and throughout inapplicable to any other country than this. It is undoubtedly the Court of *Chancery* of *England* that is here designated. In that Court there is an ancient office for the enrolment of deeds. There is indeed a Court of *Chancery* in *Grenada*, but there is no such establishment as an enrolment office belonging to it. The requisition of the law could not therefore be complied with in the island, so that what is a qualified prohibition here, would become an absolute prohibition there. They have a register of deeds, but the registration of a deed in a register office would be perfectly unavailing, where it is an enrolment in the Court of *Chancery* that is specifically required. If the legislature of the island think any measure of the same kind necessary, they may so shape and modify it, as to adapt it to their own circumstances and situation. But, framed as the mortmain act is, I think it quite inapplicable to *Grenada*, or any other colony. In its causes, its ob-

1817.

 ATTORNEY-
 GENERAL'
 v.
 STEWART.

1917.

ATTORNEY-
GENERAL
v.
STEWART.

jects, its provisions, its qualifications, and its exceptions, it is a law wholly *English*, calculated for purposes of local policy, complicated with local establishments, and incapable without great incongruity in the effect, of being transferred as it stands into the code of any other country. I am of opinion, therefore, that it constitutes no part of the law of the island of *Grenada*, and that the Exception must consequently be allowed.

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ROLLS.

Feb. 19. 21. 25.

ANGELL v. HADDEN.

ANGELL v. LOADEN.

After a Decree referring it to the Master to enquire whether an annuity had been properly enrolled, the Master having reported against the enrolment, it was

BY the Decree made in the first of these causes (see 16 Ves. 202), it was referred to the Master to enquire whether proper memorials of the respective annuities had been enrolled, and to state the priorities among the annuitants, and to take an account of what was due to each of the annuitants, the memorials of whose annuities he should find to have been properly enrolled; and, the Plaintiff admitting that he had then in his hands £135 arrears of the rent objected by the Defendant (the annuitant), on a rehearing, that the Decree had been pronounced after two several orders made in this Court, in another cause, for payment of the annuity, and after a Rule to shew cause in favour of the annuity in the Court of King's Bench had been discharged. Held not a sufficient ground for setting aside the Decree; the former cause in which those orders had been obtained not having been instituted for the purpose of setting aside the annuities, and this Court having jurisdiction, after the failure of an attempt to set aside an annuity at common law.

charge of £600, it was ordered that he should there-out retain his costs, and should pay the residue (if any) into Court, and that he should from time to time pay into Court what should be due from him on account of the said rent charge.

1817:
ANGELL
v.
HADDEN.

The Plaintiff afterwards filed a Bill of revivor and supplement, upon which a like Decree was pronounced, and the Injunction granted to restrain the Defendants from proceeding against the Plaintiff was ordered to be continued.

On the 21st of *November*, 1815, the Master made his Report, by which he certified that he was of opinion that proper memorials of the annuities had not been enrolled, and had therefore not proceeded to enquire as to the respective priorities, nor to take the accounts directed by the Decree.

To this report no exceptions were taken, but the Defendant *Tilson*, (one of the annuitants), presented a petition of re-hearing, whereby he submitted that so much of the decrees as directed a reference to enquire whether proper memorials of the annuities granted to the petitioner had been enrolled, and to state the priorities, &c. and an Injunction against the petitioner was erroneous, and that the Plaintiff's bill ought to have been dismissed with costs as against the petitioner.

The grounds stated by this petition were, that by an Order made in another cause, of *Angell v. Smith*, in August 1798, upon the petition of the Defendant, Mrs. *Hadden*, praying that the payment of the annuities to *Tilson* might no longer be made by the receiver in the said cause of the estates whereon her rent charge was secured, by reason of the annuities not

1817.

ANGELL
v.
HADDEN.

having been properly enrolled, it was ordered that that petition should be dismissed; that by another order in the same cause, dated the 8d of *November*, 1798, on a petition by *Tilson*, it was ordered that the receiver should continue to discharge the said annuities; and that on the 19th of *November*, 1798, *Reed* and his wife (now the Defendant *Mrs. Hadden*), obtained a rule in the *King's Bench* against *Tilson*, to show cause why the judgment signed should not be vacated, and why the deeds and warrant of attorney executed for recovering the said annuities, should not be declared void; which rule was afterwards discharged with costs, upon the several proceedings in this Court being shown for cause.

The cause now came on, in the first place upon the petition of rehearing, when it was contended, in support of the petition, that it having been twice in this Court, and once by the Court of *King's Bench*, decided that the annuities were valid annuities, it was not competent to the Court afterwards to direct an enquiry before the Master respecting the validity of these same annuities; that, if *Mrs. Hadden* had filed the Bill in her own name, the orders already made in the cause of *Angell v. Smith* might have been pleaded in bar, and that the filing of the present Bill by her son was obviously only collusion, with a view to prevent that consequence from directly arising. And the cases of *Hart v. Lovelace* (a), *Greathead v. Bromley* (b), and *Schurman v. Weatherhead* (c), were cited as authorities, that where the validity of an annuity has come in judgment before a Court of competent jurisdiction, no other court will suffer the same objection to be again agitated, and

(a) 6 T. R. 471.

(c) 1 East, 537.

(b) 7 T. R. 455.

that where, upon a summary application to set aside annuities for non-compliance with the requisites of the act, the rule was discharged upon discussion of the merits, the Court will not entertain a similar application between the same parties, on the same state of facts, even though grounded on a new objection to the annuity, which was not before urged or considered.

1817.
ANGELL
v.
HADDEN.

On the other side it was argued, that the case was fully before the Court at the hearing in 1809; that it was incorrect to say that the orders made in the other cause could have been pleaded in bar, since interlocutory orders are not strictly pleadable matters; and that the parties themselves who sought this rehearing, had departed from the strict observance of those orders; and they cited *Crossley v. Arkwright (a)*, and *Saunders v. Hardinge (b)*, that an annuity deed is not merely voidable, but absolutely void, where the memorial is not duly registered according to the provisions of the act.

Sir S. Romilly, Agar, and Horne, in support of the Petition.

Fonblanque and Treslove, for the Defendants *Hadden* and wife.

Trower and *Merivale*, for the Plaintiff, resisted the charge of collusion, which there was no sort of evidence to support.

The MASTER of the ROLLS:

Observed, that it had been decided by the present Lord Chancellor in the case of *Bromley v. Hol-*

(a) 2 T. R. 603

(b) 5 T. R. 9.

1817.

 ANGELL
 v.
 HADDEN.

land (a), that the rejection of a summary application to a Court of Law for the purpose of setting aside an annuity, is not a ground for refusing relief in this Court on a Bill filed; and that, with respect to the orders made by Lord *Rosslyn* (b), it did not appear by the Petition upon what grounds those orders were made, nor whether the merits of the question were at all entered into; the probability being the other way; since the suit of *Angell v. Smith* was only instituted for the usual accounts against an executor, and the Decree (c) was, that the will should be established, and a reference for the ordinary purposes. This Court will not order an annuity to be set aside on motion or petition, where it does not constitute part of the relief sought by the Bill; and, as the Bill in *Angell v. Smith* did not seek to have the annuities set aside, it follows that it could not have been a subject of discussion. Neither party can, therefore, be considered to be definitively bound, as by *Res judicata*. If it were *Res judicata*, that would have been a reason why no Injunction could have been obtained; but no such objection was taken to the application for an Injunction; and indeed it appeared to have been waived by the parties resorting to objections merely in point of form as arising out of the peculiar nature of Bills of interpleader. There was nothing, then, to prevent Mrs. *Hadden* from filing a Bill to set aside these annuities, if she had chosen to do so; and she was placed in the same situation, by being made a Defendant to an interpleading Bill, as if she had herself come into this Court for the purpose.

Petition dismissed. [Reg. Lib. 1816. A. fo. 1173.]

(a) 5 Ves. 610. 7 Ves. 3. (b) See Reg. Lib. A. 1797. Coop. 9. And see 7 T. R. fo. 897. 974.

455.

(c) 24th Feb. 1797. Reg. Lib. A. 1796. B. 531.

1817.

ANGELA

v.

HARRIS.

On an annuity secured upon a rent-charge, which was settled in trust for a married woman, being set aside, the annuitant is not entitled to recover the consideration given by him, for the annuity out of the arrears of the rent-charge, paid into Court under a Decree made upon a Bill of interpleader filed by the owner of the estate, subject to the rent-charge.

The Cause afterwards coming on for further directions, it was insisted, on behalf of the annuitants, that although, by not excepting to the Master's Report, they might be taken to have acquiesced in it, they were, notwithstanding, entitled to have an account of what was due to them in respect of sums actually advanced by way of consideration for their several annuities, with interest, and to be paid the balances, if any, which were due to them in respect thereof, out of the fund in Court which had arisen from the monies from time to time paid in by the Plaintiff under the Decree; claiming a specific lien upon the fund in Court to that extent.

On the other side it was said that this fund, constituting part of the separate estate of the wife, was not liable to the claims of the annuitants in respect of their actual advances; in support of which was cited *Jones v. Harris (a)*.

His Honor said, that if he could discover any solid ground of distinction between this case and that of *The Duke of Bolton v. Williams (b)*, he should have been glad to apply the principle adopted by Courts of Law, with respect to the recovery back of the consideration (c); but that the circumstances of both cases being precisely the same, he could not do otherwise than follow the precedent of the former case, leaving the annuitants to such remedy as they might have at law.

(a) 9 Ves. 486.

(b) 4 Bro. 297. 2 Ves.

an. 138. Referred to in

Jones v. Harris, 9 Ves. 494,

&c. And see the Decree in that case, Reg. Lib. A. 1791.

fo. 329.

(c) See 9 Ves. 492.

1817.

ANGELL

v.

HADDEN.

It was accordingly ordered that it should be referred back to the Master to take an account of what was due and in arrear from the Plaintiff in respect of the rent-charge of £600 per annum; and to tax the Plaintiff his costs as between solicitor and client; the Plaintiff to pay the residue (if any) of what should be so found due from him, after retaining the amount of such costs, to the Defendant *Ann a dden*; in case of deficiency, the amount of such deficiency to be raised by sale of a sufficient part of the fund in Court; the Plaintiff to pay the said annuity of £600 in future, as it shall from time to time become due, to the said Defendant. The Injunction to be made perpetual as against the several annuitants, and to be dissolved as against the said Defendant. The several parties to be paid their costs out of the fund in Court. The Master to enquire and certify how much of the residue, after payment of such costs, belonged to the defendant *Ann Hadden*, in respect of her said annuity of £600, and how much to her late husband *Reed*, under the trusts of her marriage settlement; and to be paid accordingly.

Sir *S. Romilly*, *Agar*, *Horne*, *Wingfield*, and *J. Martin*, for different annuitants.

END OF PART THE FIRST.

REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

HIGH COURT OF CHANCERY,

Commencing in the Sittings before

MICHAELMAS TERM,

57 GEO. 3. 1816.

1817.



Between

Marquis CHOLMONDELEY and the Honourable
ANN SEYMOUR DAMER, - PLAINTIFFS;

And Lord CLINTON, FRANCIS DRAKE, AM-
BROSE ST. JOHN, JOHN INGLETT FOR-
TESCUE, Sir LAWRENCE PALK, (deceased,)
WILLIAM SEYMOUR, and others,

DEFENDANTS.

Jan. 27, 28.

Feb. 4. 6. 10.

11. 18.

June 28.

And between the same Plaintiffs,

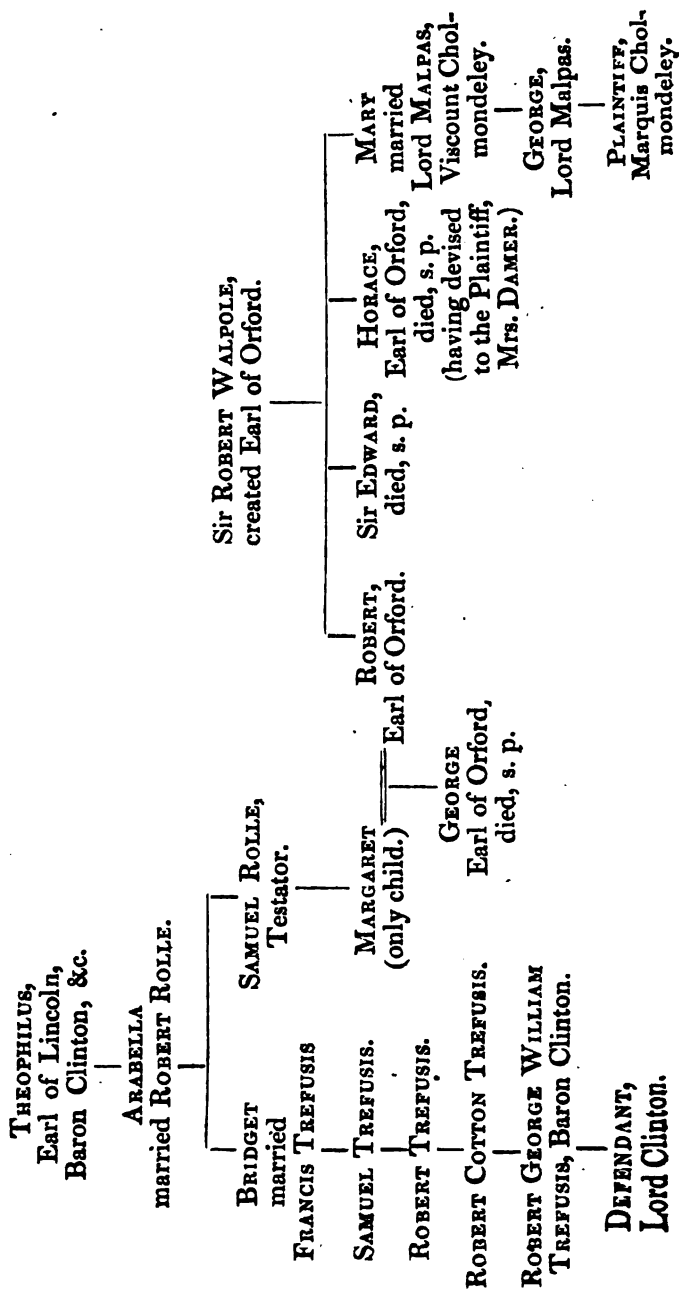
And Sir LAWRENCE VAUGHAN PALK, (an In-
fant,) Dame DOROTHY ELIZABETH PALK,
Sir THOMAS TYRWHITT, and the Earl of
SHAFTESBURY, - - DEFENDANTS.

(By Original Bill, and Bill of Revivor and Supple-
ment.)

VOL. II.

N

PEDIGREE.



1817.

CHOLMONDE-
LEY

v.

CLINTON
and Others.


S. R. devises,
subject to a
term of 200
years for rais-
ing portions, to
the use of his
daughter *M.*
for life, re-
mainder to the
use of her first
son in tail male,
remainder to
his cousin *J. R.*
in tail, &c.; and
dies, leaving his
daughter *M.*
his heir at law;

who marries,

BY Indentures of Lease and Release, dated the 24th and 25th *October*, 1704, being the settlement made previous to the marriage of *Samuel Rolle*, of *Heanton*, in the county of *Devon*, Esq. with *Margaret*, only daughter of *Roger Tuckfield*, of *Raddon Court*, in the said county, deceased, the several manors and hereditaments of the said *Samuel Rolle*, in the counties of *Devon* and *Cornwall*, therein described, were settled to the use of *Samuel Rolle*, for his life, with remainder to the use of trustees and their heirs, during the life of *Samuel Rolle*, upon trust to preserve contingent remainders; and, after the decease of *Samuel Rolle*, subject to a rent charge of £1000, payable to the said *Margaret Tuckfield* for her life, in bar of dower, to the use of the said trustees for the term of two hundred years, upon trust, in case there should be issue of the marriage only one daughter, to raise £20,000 as a portion for such daughter, with remainder to the use of the first and other sons successively in tail male, with remainder to the use of *Samuel Rolle*, his heirs and assigns, for ever.

and has one son, *G. Earl of O.*; who, upon the death of his mother, enters as tenant in tail under the will of his grandfather, suffers a recovery to the use of himself in fee, and, by Deed (1781), reciting, "that he was willing and desirous that the said estates should remain in the family and blood of *S. R.*" in consideration of "the natural love and affection which he bore to his relations the heirs of *S. R.*, and to the intent that the estates might continue in the family and blood of his late mother on the side of her father," settles the estates to the use of himself for life; remainder to the heirs of his body; for default of such issue, as he should appoint; for default of appointment, "to the use of the right heirs of *S. R.*;" with a general power of revocation and new appointment.

G. Earl of O. afterwards, by Deed (1785), converts the mortgage term of two hundred years into a mortgage in fee; and dies, without issue, leaving *H. Earl of O.* his uncle and heir at law. Upon the death of *Earl*

1817.

 CHOLMONDE-
 LEY
 v.
 CLINTON
 and Others.

Samuel Rolle had issue by the marriage only one daughter *Margaret*; and being seised in fee of the settled estates, subject to the subsisting uses of the settlement, made his will, dated the 22d of *October*, 1717, whereby he devised the fee-simple and inheritance of the said settled and other estates, to his wife, *durante viduitate*, with remainder to trustees and their heirs, to the

G., *C.* enters, as the then right heir of *S. R.*, and settles the estates by deed (1792).


H. Earl of *O.* being subsequently applied to by *C.*, on account of doubts which had arisen with regard to the effect of the Deed of 1785, as a revocation of the settlement of 1781, executes a Deed (1794), by which, reciting those doubts, and "that, being well satisfied that Earl *G.* did not intend to alter the uses of that settlement, he had agreed to confirm the same," it was witnessed that he, Earl *H.*, did "grant, bargain, sell, release and confirm," to the trustees of *C.*'s settlement of 1792, upon the trusts of that settlement, "in the same manner as if the deed of 1785 had not been made, and to and for no other use, intent or purpose whatever."

Earl *H.* dies, leaving *A.* his heir at law, and also heir at law of Earl *G.*; and having devised all the rest and residue of his real estates, in the most general terms to *B.*

C. also dies; and upon his death his eldest son enters under the settlement of 1792.


Upon a bill filed by *A.* and *B.* jointly, as heir at law and devisee of Earl *H.*, stating an agreement between them to share equally, and praying a Redemption and Reconveyance, and (as against *C.* the son) an account of Rents and Profits; held, *first*, that by the construction of the settlement of 1781, the remainder "to the use of the right heirs of *S. R.*" vested in the settlor, as himself the right heir of *S. R.* at the date of the settlement; *secondly*, that the deed of 1794 did not operate as a confirmation, except for the limited purpose expressed by the recital; and *lastly*, that the length of time, viz. upwards of twenty years, since *C.* entered, was no bar by analogy to the statute of limitations. Also held, that Sir *L. P.*, having advanced money to *C.* by way of mortgage, should not be permitted to avail himself of that security, as against the Plaintiffs, upon the ground, either of want of notice, or of acquiescence.

use of the first and other sons of his body begotten or to be begotten, in tail male in succession, and for default of such issue to the use of his daughter *Margaret* for her life, remainder to trustees to preserve, &c. remainder to the use of such child or children of his said daughter as she should appoint; and for default of appointment to the use of her first and other sons successively in tail male; and, if she should die without issue, then the testator devised all his said estates to his cousin, *John Rolle*, of *Shipwick*; and his heirs male; and for default of such issue, to *Samuel Rolle* (the brother of *John*), and his heirs for ever.

1817.

 CHOLMONDE-
 LEY
 v.
 CLINTON
 and Others.

The testator, *Samuel Rolle*, died in 1719, leaving his daughter *Margaret*, his only child and heir at law, who, upon his death, entered into possession of the estates devised to her for her life; and by indenture, dated the 24th of *March*, 1720, in pursuance of a decree made in a cause wherein the said *Margaret Rolle* (the daughter) was Plaintiff, and the widow of the testator, and others, Defendants, the remainder of the term of two hundred years was assigned *Arscott* and *Spicer*, upon the subsisting trusts of the settlement.

In *March*, 1724, *Margaret Rolle* (the daughter) married *Robert*, Lord *Walpole*, (afterwards Earl of *Orford*;) and by articles dated the 26th of *March*, 1724, made previous to the marriage, it was agreed that the Earl of *Orford* (Lord *Walpole's* father) should receive the £20,000 raiseable under the trusts of the two hundred years term, and that *Arscott* and *Spicer* should, by mortgage, sale, or assignment of the premises, raise and pay the same accordingly, with all convenient speed, under an order of the Court to be first obtained for that purpose. And by indenture, dated the 9th of *July*, 1724, (an order to raise the sum by mortgage having been first obtained,)

1817.

 CHOLMONDE-
 LEY
 v.
 CLINTON
 and Others.

Arscott and Spicer, in consideration of £20,000 paid to *Sir Robert Walpole*, assigned to *Decker*, his executors, &c. for all the remainder of the term of two hundred years, subject to a proviso for redemption by *Robert Lord Walpole* and *Margaret* his wife.

There was issue of this marriage only one son, *George*, Earl of *Orford*; who, upon the death of his mother, *Margaret*, on the 13th of *January*, 1781, entered into possession as tenant in tail male, under the will of *Samuel Rolle*, his grandfather.


By indenture of bargain and sale inrolled, dated the 11th *June*, 1781, the uses of a recovery shortly afterwards suffered by *George*, Earl of *Orford*, were declared to himself in fee.

By indenture of lease and release, dated the 1st and 2nd of *August*, 1781, between *George*, Earl of *Orford*, (described as only son and heir of *Robert*, Earl of *Orford*, by *Margaret* his wife, who was daughter and only surviving child and heir of *Samuel Rolle*, who was only son and heir of *Robert Rolle*, Esquire, by *Arabella* his wife, who was daughter and coheir of *Theophilus Clinton*, Earl of *Lincoln* and Baron *Clinton*) of the one part, and *Joshua Sharpe* of the other part; reciting the will of *Samuel Rolle*, and his death, leaving his daughter *Margaret* him surviving, her marriage with *Robert*, Earl of *Orford*, and her death, leaving him, the said *George*, Earl of *Orford*, her only son, who thereby became tenant in tail of the premises; and reciting the said indenture of bargain and sale and recovery, and that he was “willing and desirous that the said premises should continue and remain in the family and blood of the said *Samuel Rolle*,” it was witnessed, that “for and in consideration of the natural love and affection which

"the said *George*, Earl of *Orford*, had and bore unto
 "his relations, the heirs of the said *Samuel Rolle*, and
 "to the intent that the manors, &c. and hereditaments
 "thereinafter mentioned, might remain, continue, and
 "be in the family and blood of his late mother, the said
 "*Margaret*, Countess of *Orford*, on the side or part of
 "her father, the said *Samuel Rolle*," and for other con-
 siderations, he the said *George*, Earl of *Orford*, conveyed,
 &c. all and singular the manors and hereditaments
 therein mentioned (being the estates devised by the will
 of *Samuel Rolle*), to the said *Joshua Sharpe*, his heirs
 and assigns, to the use of him the said *George*, Earl of
Orford, for life; and after his decease to the use of the
 heirs of the body of him the said *George*, Earl of *Or-*
ford; and for default of such issue, to the use of such
 person, &c. for such estate, &c. as the said *George*, Earl
 of *Orford*, by deed or will, should appoint; and in de-
 fault of appointment, "to the use of the right heirs of
 "the said *Samuel Rolle* for ever." And in the said deed
 was contained a general power to the said *George*, Earl
 of *Orford*, of revoking the uses thereinbefore specified,
 and of limiting and declaring new uses of the same pre-
 mises, or any part thereof.

By several mesne assignments, the manors, &c. com-
 prised in the two hundred years term became vested, for
 the residue of that term, as to four-fifths, in Lord *Keppel*,
 redeemable on payment of £16,000 and interest; and,
 as to one-fifth, in *Adair* and *Bullock*, redeemable on pay-
 ment of £4000 and interest; and, by indentures of lease
 and release, dated the 4th and 6th of *June*, 1785, *George*,
 Earl of *Orford*, in consideration of £16,000 paid to
 Lord *Keppel*, and of £4000 paid to *Adair* and *Bullock*,
 granted, released, and confirmed to Sir *Edward Hughes*,
 his heirs and assigns, all the premises, to the use of the
 said Sir *Edward Hughes*, his heirs and assigns for ever,


1817.
 CHOLMONDE-
 LEY
 v.
 CLINTON
 and Others.

1817.

 CHOLMONDE-
 LEY
 v.
 CLINTON
 and Others.

subject to reconveyance to the said *George, Earl of Orford*, his heirs and assigns, or such person, &c. as he should appoint, on payment of £20,000, with interest.

On the 5th of *December*, 1791, *George, Earl of Orford*, being (as the Plaintiffs alleged) seised in fee of the equity of redemption of the mortgaged estates, died, without issue, and intestate as to the said equity of redemption, without having altered or revoked the limitations of the deed of 1781, otherwise than by the indentures of 1785, and leaving *Horace, Earl of Orford*, his uncle and heir at law, on whom the said equity of redemption descended; but the said *Horace, Earl of Orford*, being advised that, by virtue of the limitations in the deed of 1781, the heir *ex parte maternâ* of Earl *George* was entitled to the equity of redemption, in consequence of such belief did not enter into the mortgaged estates, but, upon the death of Earl *George*, *Robert George William Trefusis*, Esquire, afterwards Lord *Clinton*, entered into possession thereof, as the cousin and heir of Earl *George, ex parte maternâ*; and by indentures of lease and release, dated the 5th and 6th of *October*, 1792, to which he was a party, after reciting the deed of 1785, and that the premises did, upon the death of the said *George, Earl of Orford*, become vested in the said *R. G. W. Trefusis* in fee, as the right heir of the said *Samuel Rolle*, by virtue of the settlement of 1781; and that the said *R. G. W. Trefusis* was desirous of raising £34,000 for certain purposes, and had proposed to convey, &c. it was witnessed that, in consideration of the premises, the said *R. G. W. Trefusis* granted, &c. and confirmed unto the Earl of *Coventry, Hall, St. John*, and *Portescue*, their heirs and assigns, &c. all the manors, &c. of the said *R. G. W. Trefusis* which were the estate of *Samuel Rolle*, deceased, to the use of them the said Earl of *Coventry*, &c. their heirs and assigns, upon trust,

to raise, by sale or mortgage, the said £34,000, for the purposes therein mentioned; and, subject thereto, to stand seised, &c. in trust, and to such uses, &c. as the said *R. G. W. Trefusis* should appoint; and, in default of appointment, in trust for the said *R. G. W. Trefusis*, his heirs and assigns; and by other indentures of the 7th and 8th of *October*, 1792, it was witnessed that, for settling and assuring the several manors, &c. therein contained, and in consideration of his natural love and affection to his wife and children, and brothers and sisters, the said *R. G. W. Trefusis* granted, &c. and confirmed to the same trustees and their heirs, upon the trusts therein mentioned.

1817.

**CHOLMONDE-
 LEY**
 v.
**CLINTON
 and Others.**

The Bill then stated, that shortly after the death of *Earl George*, a doubt was suggested to *Earl Horace*, whether the deed of 1785 had not revoked the uses of the settlement of 1781, and thereby defeated the limitation to the right heirs of *Samuel Rolle*, under which *Lord Clinton* claimed to be entitled to the equity of redemption of these estates; and that *Earl Horace* thereupon caused a case to be stated for the opinion of counsel, which case being laid before *Sir Archibald Macdonald* (afterwards Lord Chief Baron), and the late *Mr. Shadwell*, *Earl Horace* was advised by both those gentlemen that the indentures of 1785 had revoked the uses of the settlement of 1781 only *pro tanto*.

[This Case, and the opinions, which were stated in the Bill, and proved in the cause, are given in the note below (a)].

(a) *Case for the Opinion
 of Counsel.*

6th June 1781. By indenture between Lord Orford of

the first part, *Charles Lucas* of the second part, and *Joshua Sharpe* of the third part, said Lord Orford conveys to Mr.

1817.

CHOLMONDE-
LEY
v.
CLINTON
and Others.

The Bill proceeded to state that, in the beginning of 1794, Lord *Clinton* (the Defendant's father,) being

Lucas, the estates in *Dorset*, *Devon*, and *Cornwall*, to make him tenant to the precipe, that three common recoveries might be suffered, the uses of which were declared to Lord *Orford* in fee.

18th and 19th September, 1781, Lord *Orford* conveys to trustees the *Piddleton* estate in *Dorsetshire*, to such uses as he should by deed or will appoint, and for want of appointment, to Mrs. *Tuck* for life, remainder to *Horatio Walpole* for life, remainder to his first and other son and sons in tail male, remainder to his daughters in tail, remainder to the right heirs of *Samuel Rolle*, Esquire, of *Heanton*, deceased; power of revocation by deed or will, and of declaring new uses.

1st and 2d August, 1781, Lord *Orford* conveys to a trustee the estates in *Devon* and *Cornwall*, to use of Lord *Orford* for life, sans waste, remainder to the use of the heirs of his body, remainder to such person or persons as he should by deed or will appoint, remainder to the right heirs of *Samuel Rolle* for ever; power of revocation, and of declaring new uses by deed or will.

5th and 6th June, 1785. Lease and release, between

Lord *Orford* of the first part, Lord *Keppel* and others, executors of Lord *Albemarle*, (being former mortgagees of the *Dorset*, *Devonshire*, and *Cornwall* estates,) of the second part, and Sir *Edward Hughes* of the third part, reciting a former mortgage of said estates for £20,000, and reciting said indenture of bargain and sale inrolled, 6th June, 1781, for suffering recoveries of said estates, and for declaring the uses to said Lord *Orford* in fee, and reciting that said executors of Lord *Albemarle* had occasion for the money, and Sir *Edward Hughes* had agreed to advance it, said "George Earl of *Orford* did grant, bargain, sell, release, and confirm the estates in *Dorset*, *Devon*, and *Cornwall*, to hold to Sir *Edward Hughes* in fee, subject to a proviso of redemption upon payment of £20,000 and interest to Sir *Edward Hughes*, by Lord *Orford*. his heirs, executors, and administrators, at the time and in manner therein mentioned. That said Sir *Edward Hughes* his heirs and assigns should and would at the request, costs, and charges of the said

about to raise money by way of loan on the security of the estates, caused a representation to be made to Earl


“ *George Earl of Orford*, his
 “ heirs and assigns, release
 “ and convey the premises
 “ unto the said *George Earl*
 “ of *Orford*, his heirs and
 “ assigns, or unto such per-
 “ son and persons as he or
 “ they should direct or ap-
 “ point; covenant from Lord
 “ *Orford* to pay the £20,000.
 “ *N. B.* This mortgage-
 “ deed takes no notice of the
 “ voluntary settlements of
 “ *August* and *September* 1781.
 “ Lord *Orford* is lately dead,
 “ leaving the present Earl,
 “ his uncle and heir at law,
 “ and by his will takes no
 “ notice of estates in *Dorset*,
 “ *Devon*, or *Cornwall*. Qu.
 “ As the mortgage-deed has
 “ limited the equity of re-
 “ demption of the fee of the
 “ estates to Lord *Orford*,
 “ his heirs and assigns, will
 “ the equity of redemption
 “ of the estates descend to
 “ the heir at law of the late
 “ Earl of *Orford*, or go ac-
 “ cording to the deeds of
 “ *August* and *September*,
 “ 1781 ?”


*Opinion of the late Lord
 Chief Baron.*

“ The question in this
 “ case will be, whether the
 “ lease and release of the
 “ 5th and 6th June, 1785, will

“ be held to operate as a
 “ total, or only a partial re-
 “ vocation of the several
 “ deeds of *August* and *Sep-*
 “ *tember* 1781.”

The general doctrine is,
 that where the whole estate is
 conveyed so as to operate as
 a revocation at law, yet equi-
 ty will consider such con-
 veyance as a revocation *pro*
tanto only, if it be intended
 as a security only to let in
 a particular incumbrance ;
 “ and this is held as in case
 “ of a mortgage in fee. This
 “ doctrine, which applies to
 “ conveyances for payment
 “ of debts to mortgagees, and
 “ other securities for money,
 “ is an exception to the ge-
 “ neral rule, that where lands
 “ are devised, and an alter-
 “ ation is made in the estate
 “ by a subsequent deed in-
 “ consistent with the will,
 “ a revocation will be effec-
 “ tuated ; there are many
 “ cases on this subject, the
 “ nearest to the present, is
 “ that of *Vernon* and *Jones*,
 “ 2 Vern. 241. The only
 “ difference between that
 “ case and the present is,
 “ that, in the present, the
 “ equity of redemption is to
 “ be conveyed to the Earl
 “ of *Orford*, his heirs, &c.
 “ or unto such other person

1817.

 CHOLMONDE-
 LEY
 v.
 CLINTON
 and Others.

1817.

 CHOLMONDE-
 LEY
 v.
 CLINTON
 and Others.

Horace, that, although by the limitation to the right heirs of *Samuel Rolle* in the settlement of 1781, he (Lord *Clinton*) had become entitled to the equity of redemption, yet some embarrassment had arisen to his

“ or persons as he or they
 “ shall direct or appoint.

“ The late Earl had, by
 “ the deed of *September*,
 “ 1781, retained to himself
 “ a power of appointment of
 “ the estates comprized in
 “ that deed in the beginning
 “ of it; and, in the deed of
 “ *August*, 1781, the like
 “ power is given to him,
 “ after the limitation to the
 “ heirs of his body. It may
 “ be said that the words, *and*
 “ *unto such person as he or*
 “ *they shall direct or appoint*,
 “ which are not to be found
 “ in any of the printed cases,
 “ which I have met with,
 “ shew an intent in the tes-
 “ tator, when connected with
 “ his powers of appointment,
 “ that the deed of 1785
 “ meant to go further than
 “ *partially* to revoke the
 “ former deeds. I do not,
 “ however, upon the whole
 “ think that such an effect
 “ would be given to those
 “ words; as I conceive that,
 “ without the aid of express
 “ words, he or his heirs and
 “ assigns might have direct-
 “ ed the equity of redemp-
 “ tion to be conveyed, but

“ that this case will only be
 “ considered as a case of
 “ partial revocation, in order
 “ to let in the mortgages.
 “ *A. Macdonald*, *February*
 “ 2d, 1792.”

Opinion of the late Mr.
Shadwell.

“ The intention of the
 “ deeds of 1785, being mere-
 “ ly to transfer an incum-
 “ brance, which had existed
 “ for near 60 years, to a new
 “ mortgagee, and there be-
 “ ing no notice taken of the
 “ settlements of 1781, nor
 “ any recital of the late Earl's
 “ desire of vesting the fee-
 “ simple in himself in oppo-
 “ sition to the uses of the
 “ settlement, I am of opinion
 “ that, in equity, those uses
 “ are not revoked, and that,
 “ subject to the mortgage
 “ (which, if not dischargeable
 “ out of other funds, will fall
 “ proportionably upon both
 “ settled estates), the equity
 “ of redemption will go ac-
 “ cording to the limitations
 “ in the respective settle-
 “ ments.

“ *Lancelot Shadwell*, *Lin-*
 “ *coln's Inn*, *January*, 1792.”

title, by reason of a doubt which had been raised, whether the indentures of 1785 had not revoked that limitation; therefore requesting Earl *Horace* to execute such deed or instrument as should be necessary to remove that doubt. That Earl *Horace*, having already taken the aforesaid opinions, and being therefore satisfied that such doubt was unfounded, consented to execute such deed or instrument as was required.

1817.

CHOLMONDE-
LEY
v.
CLINTON
and Others.

Accordingly, by indentures of lease and release, dated the 1st and 2d of *April*, 1794, the release being made between *Horace* Earl of *Orford*, (described as uncle and heir at law of *George* Earl of *Orford*, deceased,) of the first part, the Earl of *Coventry* and others (trustees in the settlement of 1792) of the second part, and the said Lord *Clinton* (described, with an accurate statement of his pedigree from *Theophilus* Earl of *Lincoln*, as heir at law *ex parte maternâ* of the said *George* Earl of *Orford*) of the third part; after reciting the settlement of 1781, the indentures of 1785, the death of Earl *George*, and the deed of 1792, and "that doubts had arisen whether the said *George* Earl of *Orford*, having joined in the indenture of 1785, did not revoke the limitations contained in the settlement of 1781, and thereby defeat the settlement of 1792, and vest the estates in *Horace*, as heir at law of the said *George*, Earl of *Orford*, but the said *Horace* Earl of *Orford*, being well satisfied that the said late Earl did not intend to alter the uses limited by the settlement of 1781, had, at the request of Lord *Clinton*, agreed to confirm the uses of the said settlement in manner thereafter mentioned," it was witnessed that, in pursuance of the said agreement, and being desirous to confirm the settlement of 1781 and 1792, the said *Horace* Earl of *Orford* "did grant, bargain, sell, release, and confirm," unto the said

1817.


CHOLMONDE-
LEY
v.
CLINTON
and Others.

Earl of *Coventry*, &c. and their heirs, all the aforesaid manors, &c. which were the inheritance of *Samuel Rolle* and *George Earl of Orford*, "to, for, and upon such
"and so many of the powers, provisos, limitations,
"declarations, and agreements limited and declared, or
"any ways expressed of or concerning the same, in
"and by the said indentures of release, bearing date
"respectively the 6th and 8th of *October*, 1792, as
"were then existing undetermined or capable of taking
"effect, in the same manner as if the said indenture of
"the 6th of *June*, 1785, had not been made, and to
"and for no other use, intent, or purpose, whatsoever."

Lord *Clinton* (formerly *R. G. W. Trefusis, Esq.*) died on the 28th of *August*, 1798, leaving the Defendant, Lord *Clinton*, his eldest son and heir at law, who entered into possession on the death of his father, claiming to be entitled as tenant in tail under the settlement of 1792, subject to the mortgage.

Horace, Earl of Orford, made his will, dated the 15th of *May*, 1793, by which, after disposing of his estates in *Norfolk, Essex*, and *Middlesex*, and giving several pecuniary and specific legacies, he gave, devised, and bequeathed to his cousin General *Conway*, his heirs, executors, &c. "all the rest and residue of his estate
"and effects, real and personal, freehold and copyhold,
"whatsoever and wheresoever, and of what nature,
"kind, or quality soever, not thereinbefore by him
"otherwise disposed of, which he then was, or should
"be at his death, seised or possessed of, interested in
"or entitled to, or over which he had a disposing
"power;" and the said General *Conway* having afterwards died in his lifetime, by a codicil to his will, dated the 27th of *December*, 1796, Earl *Horace* appointed the Plaintiff *Ann Seymour Damer* to be his

residuary legatee and devisee in the room of her late father, the said General *Conway* deceased, and gave, devised, and bequeathed to her the said Plaintiff, her heirs, executors, &c. all the rest and residue, &c. in the same words as he had given the same by his will to her said late father.

1817.

**CHOLMONDE-
 LEY**
 v.
**CLINTON
 and Others.**

Earl *Horace* died shortly after the date of this codicil, leaving the Plaintiff *George James*, Earl (since Marquis) of *Cholmondeley*, his grand nephew and heir at law, and the Plaintiff *Ann Seymour Damer* him surviving.

The bill then stated that some questions had arisen between the Plaintiffs, respecting the will and codicil of *Horace* Earl of *Orford*, as far as regarded the equity of redemption of the said mortgaged estates, and that, in order to put an end to such questions, they had agreed to share the same between them. That they were advised that, by virtue of the limitations in the settlement of 1781, Earl *Horace* became, on the death of Earl *George*, absolutely entitled to the equity of redemption of the said estates, and that the Plaintiffs, upon the death of Earl *Horace*, became entitled to the same; that by divers mesne assignments the legal estate in the said mortgaged premises had become vested in the Defendant *Francis Drake*, subject to redemption on payment of £20,000 and interest; and that the other Defendants respectively claimed some interest in the same; charging that the deed of 1794 did not absolutely confirm the settlement of 1792, but only removed the doubts which embarrassed the supposed title of Lord *Clinton*, by reason of the mortgage deed of 1785, conveying the estates to the uses of the settlement only in such manner, as if that mortgage had not been made; and that Earl *Horace* executed the deed of 1794

1817.

CHOLMONDE-
LEY.

v.

CLINTON
and Others.

under the advice he had received as to the effect of that mortgage, and not considering that he was in fact parting with any substantial right or interest whatever, but fully believing that, by the limitation to the right heirs of *Samuel Rolle* in the settlement of 1781, Lord *Clinton* became absolutely entitled to the equity of redemption on the death of *George Earl of Orford*. The bill therefore prayed a redemption and reconveyance to the Plaintiffs, and that the Defendant, Lord *Clinton*, might be decreed to deliver up to them the possession of the premises, and the Defendant *Scymour* to assign to them, or as they should direct, the 200 years term then vested in him in trust to attend the inheritance; together with an account of rents and profits received by the Defendant, Lord *Clinton*; and that he might be decreed to pay the amount of what should be found due in taking such account, upon being allowed all sums paid by him in reduction of interest on the mortgage.

The Defendant, Lord *Clinton*, by his answer, submitted that it was the true intent and meaning of the indenture of settlement of 1781 to limit the estates to such person as should be heir at law of *Samuel Rolle* in case *George Earl of Orford* died without issue. He insisted that the deed of 1794, was executed by *Horace Earl of Orford*, for the purpose of confirming the limitations created by the settlement of 1792, and barring himself and his heirs from making any claim to the estates, or deriving any title thereto, by the operation of the settlement of 1781, or otherwise; and in order effectually to carry into execution Earl *George's* intention that the estates should vest in the right heirs of *Samuel Rolle*, being the right heirs of him (*George Earl of Orford*) *ex parte maternâ*; the *Rolles* being the family from which he had derived those estates. He admitted the possession of his father Lord *Clinton*, and

1817.

CHOLMONDE-
LEY
v.
CLINTON
and Others.


afterwards of the Trustees in the settlement of 1792, and of receivers appointed by the Court, in a suit, in which the Defendant (then an infant) was Plaintiff, and the Earl of *Coventry* and others, Defendants, to carry into execution the settlement of 1792; which possession was alleged to have been quiet and uninterrupted till the filing of the bill. The answer then stated indentures of lease and release, dated the 26th and 27th of *November*, 1811, between *Edward Hughes Ball*, then an infant, and heir at law of Sir *Edward Hughes*, deceased, of the first part, certain parties therein named of the second part, and the Defendant *Drake* of the third part, by which, after reciting the mortgage deed of 1785, and an order by which it was referred to enquire whether the said *E. H. Ball* was an infant trustee, within the meaning of the statute, and the Report of the Master thereon, it was witnessed that, in consideration of £20,000 paid by the Defendant *Drake* to the parties of the second part, the said *E. H. Ball* conveyed to the said Defendant, his heirs, and assigns, subject to the equity of redemption subsisting in the said estates; which sum of £20,000 so paid, was the proper monies of the Defendant Lord *Clinton*, the name of the other Defendant being made use of only as a trustee for him. The Defendant further said, that no application had ever been made by the Plaintiffs to him, or to the Defendants the Trustees to his knowledge, previous to filing the bill, except by two letters to the Defendant *Drake*, written in *May* and *June*, 1812, and thereby referred to; but that both the Plaintiffs permitted him the Defendant, and those claiming under him, to enjoy the estates without setting up any claim thereto, although under no disability to do so. He submitted that it was the intention both of Earl *George*, when he executed the settlement of 1781, and of Earl *Horace*, when he executed the deed of

1817.

CHOLMONDE-
LEY
v.
CLINTON
and Others.

1794, that the estates should become vested in the family of *Samuel Rolle*, so as to be a provision for the person entitled to the barony of *Clinton*, which title was in *Earl George*, and descendible to the family of the said *Samuel Rolle*. (See the pedigree.) The answer then stated indentures of the 4th and 5th of *July*, 1794, between the late Lord *Clinton*, (described as heir at law of *Samuel Rolle*, deceased, and heir *ex parte maternâ* of *George Earl of Orford*,) of the first part, the Trustees of the settlement of 1792, of the second part, and Sir *Lawrence Palk*, Bart. of the third part, whereby, after reciting that the estates were, on the death of *Earl George*, vested in the said Lord *Clinton* in fee, as right heir of *Samuel Rolle*, and that the Trustees of the said settlement had applied to Sir *Lawrence Palk* to advance £25,000 on the security of the said estates, under the trusts of the settlement, which he had agreed to do, it was witnessed that the said Trustees, at the request of Lord *Clinton*, and the said Lord *Clinton* did grant, &c. and confirm to the said Sir *Lawrence Palk*, his heirs, &c. all the said manors, &c. which were the estate and inheritance of the said *Samuel Rolle*, and afterwards of the said *George Earl of Orford*, in the counties of *Devon* and *Cornwall*, subject to the said mortgage for £20,000 to Sir *Edward Hughes*, and subject also to redemption on payment of the said £25,000, and such further sum as Sir *Lawrence Palk* might thereafter advance, with interest. The Defendant then submitted that the Plaintiffs were entitled to no relief in equity. And the late Lord *Clinton*, and the trustees, and receivers, having been in quiet and undisturbed possession and enjoyment for upwards of twenty years before the filing of the bill, without any claim made except by the said two letters, the Defendant claimed the same benefit of such length of possession, and of the statutes, as if he had pleaded the same. He

farther said that, on the faith of having a good title under the deeds of 1781 and 1794, he had made several dispositions of large parts of the estates of his grandfather *Trefusis*, and had paid various debts of his father, which he was not liable to pay; and that his father was, as he believed, principally induced to claim the barony of *Clinton*, in consequence of his possessing the estate which had been enjoyed with that barony.

1817.

 CHOLMOND-
 LEY
 v.
 CLINTON
 and Others.

The Defendant *Drake*, in like manner, submitted the construction and effect of the deeds of 1781 and 1794, and claimed, as Trustee for Lord *Clinton*, the full benefit of the length of time and of the statutes.

The Defendants *St. John* and *Fortescue*, (surviving Trustees of the settlement of 1792,) said that, until the filing of the present bill, no notice of the claim or demand of the Plaintiffs was ever made to them or either of them, and claimed indemnity.

The Defendant Sir *Lawrence Palk* stated the application made to him by Lord *Clinton*, then being in the possession or enjoyment of the estates, and being, or pretending to be, with the full knowledge of Earl *Horace*, absolutely seised of and entitled thereto, and his consequent advances of money on the security of the estates under the mortgage deed of 1794, amounting, together with interest, at the time of putting in his answer, to £41,000 and upwards. He claimed to be entitled to the full benefit of that mortgage, as well against the Plaintiffs as against Lord *Clinton*, and those claiming under him, and also all such benefit of the mortgage to Sir *Edward Hughes* as a collateral security for his advances generally, and especially for sums paid for interest by him to the representatives of Sir *Edward Hughes*, upon his mortgage of £20,000, as he had in-

1817.

CHOLMONDE-
LEY
v.
CLINTON
and Others.

any manner become entitled to in equity, by virtue of his contract with Lord *Clinton* and his Trustees, and under the general circumstances of the case. He alleged that he had never, until long after he had made these advances, any knowledge or notice of any right or title in Earl *Horace*, or any persons claiming under him, or any belief or suspicion, or any reason to believe or suspect, that Lord *Clinton* and his Trustees had not full right and title. And he submitted that, even if Lord *Clinton's* title was not absolutely good and indefeasible at law against Earl *Horace* and those claiming under him, yet, Earl *Horace* having permitted Lord *Clinton* to enjoy the estates as his own, under a claim of absolute ownership, and having, with full knowledge of the trust deed of 1792, instead of questioning Lord *Clinton's* right to the estates, confirmed it in the manner before-mentioned, and having also permitted the Defendant to advance his money upon the faith of the title so claimed and suffered to be enjoyed, the Plaintiffs ought not, claiming under the said Earl *Horace*, to be permitted to impeach the title of the Defendant as a mortgagee, and were entitled to no relief against him, except to redeem him by paying off the whole principal and interest due on his mortgage. And he claimed the same benefit of the mortgage security as if he had pleaded the same.

Sir *Lawrence Palk* having died after putting in his answer, the suit was revived as against his representatives.

Witnesses were examined on the part of the Plaintiffs, principally to prove certain exhibits, and the pedigree of Marquis *Cholmondeley*. In last *Michaelmas* term, these depositions were sought to be suppressed, as against some of the Defendants, for irregularity,

but the attempt did not succeed (a). On the part of the Defendants no witnesses were examined; and the cause now came on for hearing before His Honor, *the Master of the Rolls*.

For the Plaintiffs.

Leach.

The Plaintiffs, in this case, claim to be entitled to the Equity of Redemption of an estate, which may be called for distinction, The *Rolle* Estate, as the real representatives of *George Earl of Orford*, subject to a mortgage created in 1704, which was transferred in 1811 to the Defendant *Sir Francis Drake*, by the representatives of *Sir Edward Hughes*, in whom it was then vested; and so transferred (as it appears from the answer of *Sir Francis Drake*) in consequence of the amount of the mortgage money being then paid to them by the Defendant *Lord Clinton*. On the other hand, that Defendant claims to be entitled, not only to the money now due upon this mortgage, but also to the estate itself, subject to the mortgage; and he insists that *George Earl of Orford* is not represented by the Plaintiffs, but by himself, as to this estate.

The bill therefore proceeds to pray that possession may be delivered to the Plaintiffs of the estate in question, and that *Lord Clinton* may be decreed to account for the rents and profits received; and the prayer of the bill, to this extent, is framed upon the settled principle of a Court of Equity, that where the Court, by reason of an equitable question, has once jurisdiction of the subject, it will do complete justice between the parties, and therefore will not content itself with directing the redemption of this mortgage in favour of the Plaintiffs, and then leave them to assert at law the legal right which they would acquire by the title of the mort-

(a) See this case reported ante, p. 71.

1817.
CHOLMONDE-
LEY
v
CLINTON
and Others.

1817.

CHOLMONDE-

LEY

v.

CLINTON
and Others.

gagee, but will proceed to give the whole relief to which they are entitled.


When the parties first became acquainted with the title which they now claim to this estate, a doubt arose whether the right belonged to Mrs. *Damer*, as devisee of *Horace*, heir at law of *George*, Earl of *Orford*, or to Lord *Cholmondeley* as now heir at law of *George* Earl of *Orford*; and this doubt turned on the point, whether Earl *Horace* had such a seisin of the estate, as enabled him to devise it. To obviate the doubt, an arrangement was made between the Plaintiffs, by which they mutually conveyed to each other their interests in the estate, if it should prove to be in either of them.

I. The principal question arises on the construction of the Settlement of 1781, under which Lord *Clinton* insists that his father derived the title which he now claims.

At the time of the execution of this deed, *George* Earl of *Orford* was himself the right heir of *Samuel Rolle*, being the only child of *Margaret*, who was the only child of *Samuel Rolle*. The limitation in the deed, to the right heirs of *Samuel Rolle*, had, consequently, the same effect as a mere superfluous limitation to a grantor and his own right heirs. It made, in truth, no disposition of the estate whatever: amounting in legal effect to a mere declaration of that which would have happened if no declaration had been made. A deed speaks presently, unless its language be such as in its nature to import futurity; and is not like a will, which speaks only at the death of him who makes it.

But the Defendant contends that, though this is the clear unambiguous legal effect of the expression, yet, if the recitals of the deed be referred to, it will appear

plain that *George Earl of Orford* intended to do something very different from that which is the clear legal effect of what he has done; and that the Court is therefore to put a construction upon this limitation, not only not conformable to what the grantor has said, but in direct opposition to it. That, when the grantor has declared that the estate is to go to the right heir of *Samuel Rolle*,—that is, to the person who was right heir at the time when the deed was made,—the Court is, by the effect of the recital, to say, that it is not to go to that person, but to such person as may happen to be right heir at some future period. In other words, that the Court is to collect an intention from the recital, and, because the grantor has not done that which it is said he meant to do, therefore to strike out of the deed that which he has done, and to make a new deed for him, upon this alleged conjecture as to intention.

1817.

**CHOLMONDE-
 LEY**
 v.
**CLINTON
 and Others.**

The office of a recital is, undoubtedly, sometimes extremely useful. If a deed contains an expression which is ambiguous, it may be referred to, in order to determine in which of two senses it was meant to be used. But the use of a recital can never be extended to control clear and unambiguous expressions.

If a Court sees by the language of a recital, that the author of the deed had a purpose in view which he has not executed, it will, as every person must, regret that the intention has not been carried into effect; but, because he has not executed his own purpose, the Court cannot execute it for him. A Court cannot make a deed for a party because he has intended to do it, but has failed in the performance of that intention.

Now to proceed to examine the language of the recitals in this settlement. The Defendant says that

1817.

CHOLMONDE-

LEY


v.

CLINTON
and Others.

the deed, according to our construction, does nothing for those relations, "the heirs of *Samuel Rolle*," whose interests were the sole object of the grantor. For the sake of the argument, I will admit it to be so; but is the Court on that account to do for them what the grantor has neglected to do? I say, I admit this, because it is enough for our purpose to have recourse to that argument alone, and to say that, whatever may be collected from the recital, the Court is to decide, not what *George Earl of Orford* meant to do, but what he has done; what is the clear unambiguous legal effect of the deed which he has made. But, if it were necessary to observe at all upon the effect of the deed, as compared with the recital, I should say that it is overstated; that the deed, as far as it goes, *does* follow the intention expressed in the recital, by narrowing the estate of the grantor to an estate tail in the first instance, and thereby continuing it in the family and blood of his mother to that extent. But I place no value on this observation. I only mention it, to qualify the generality of the inference drawn from the expressions used in the recital. It is nevertheless, undoubtedly, when compared with that recital, a very whimsical deed, and remarkably inconsistent with the purpose of fixing the estate in the family; actually reserving to the grantor a power of disposing of it entirely away from them. How little, therefore, can we collect of the real intention of the grantor, from the expressions he has used in such a deed! If, as the Defendants contend, the Court is to strike out of the deed the limitation to the right heirs of *S. Rolle*,—*i. e.* to his *then* right heirs,—and substitute a limitation to such persons as shall, at some future period, sustain that character, at least the Court must most distinctly see what is the future period at which the description of "right heirs of *S. Rolle*" is meant to apply. Those who claim under an alleged intention,

must show with absolute certainty what that intention is. The Defendants say, it was not the present right heir of *Samuel Rolle*, but the person who should answer that description at the death of *George Earl of Orford*, that was intended; and that such an interpretation would be inconsistent with the other limitations in the deed. Would it not be equally consistent, if, instead of the person who should be right heir at the death of *George Lord Orford*, the Court were to substitute the person who should be right heir upon the determination of the estate tail? Upon what ground can they say that the one substitution would not be as consistent as the other? But, if it is uncertain which of two contrary limitations is to prevail, that very uncertainty would of itself avoid the deed altogether.

I have before observed, upon this question of intention, that no conjecture can be admitted to vary the precise legal effect of a clear unambiguous limitation; but, if I were to form any conjecture, from what appears in the deed itself, of what was the real intention of *George Earl of Orford*, when he made it, that conjecture would be, that he as little meant this estate for *Lord Clinton* as for any indifferent person. I verily believe, from the expressions he has used, that he would have learnt, with the utmost astonishment, that *Lord Clinton* was to claim by virtue of any supposed intention in his favour. It is impossible to doubt what was the moral feeling acting upon the mind of this nobleman at the time he made the deed: he recites in it the will of his grandfather *Samuel Rolle*, by which it appears to have been that gentleman's intention, that, in case the issue of his daughter should fail, this estate should go to his cousin *John Rolle*, and the heirs of his body; and that, upon failure of those heirs, it should go to *Samuel Rolle*, the brother of that *John Rolle*, in fee. *George Earl of Orford* addressed

1817.

 CHOLMONDE-
 LEY
 v.
 CLINTON
 and Others.


1817.

CHOLMONDE-
LEY
v.
CLINTON
and Others.

himself to the consideration of this subject with a moral feeling, that, although by the recovery he had prevented the estate from descending according to the will of his grandfather, yet it was due to his grandfather, from whom he derived this estate, that he should return it to the family of the *Rolles*, in the same manner as it would have descended if the recovery had not interrupted the course of succession; and, if he had been told that the heir of a sister of *Samuel Rolle*, who died seventy or eighty years before the deed was executed, would be the person to take under this limitation, I cannot but conjecture that it would have been an utter disappointment of his purposes, as it would equally have disappointed the purposes of his grandfather.

I agree that all this is nothing to the purpose; that there is no security for property if these conjectures are to be indulged; but I introduce a conjecture, because we see, from the tone of the pleadings, that Lord *Clinton* complains of the hardship, that, after a long possession of twenty-six years, he is to be evicted out of the estate which he and his father have enjoyed. The hardship complained of is, that Lord *Clinton* and his father having enjoyed an estate of £20,000 a-year, to which they had no title, and against the intention of the party upon whose deed they kept it, he is, at this distance of time, called upon to restore it to its legal owners. Considerations of hardship are of little value: Courts of Justice do not sit to enquire how the loss of property may press upon this individual, or that, who has held it without title. The single subject of consideration for the Courts is, whether it has been held without title; and if they find that it has been held without title, they restore it without delay to its right owner. But these allegations of hardship and length of possession never appeared to me more misapplied than they are in this case, under the

strong conviction, not only that Lord *Clinton* has no title to the estate, but that it has been held also against the intent of the grantor.

1817.

 CHOLMONDE-
 LEY
 v.
 CLINTON
 and Others.


II. But the Defendant then says, Supposing it be true that there has been a common mistake about the construction of this deed, and that he had been enjoying the estate without title under it, yet he has derived a title from the subsequent deed executed in the year 1794, by *Horace Earl of Orford*. He says, Even if I had no title under the deed of 1781, yet I claim the estate by confirmation from *Horace Earl of Orford*, under the deed of 1794. The circumstances under which that deed was executed, sufficiently explain the real nature and effect of it. Upon the occasion of the transfer of the mortgage to Sir *Edward Hughes*, in 1785, *George Lord Orford* joins in that transfer, and gives to Sir *Edward Hughes* the security of a conveyance in fee. It seems that, two or three years after the death of *George Earl of Orford*, Lord *Clinton*, being in possession under the mistaken construction of the deed of 1781, which then prevailed, was about to make some arrangement, which required that he should be able to satisfy a purchaser that he had a clear undoubted title. Some doubt, it seems, had suggested itself, that the mortgage in fee might be considered as a revocation of the limitations of the settlement, and that it might be as well to clear away that doubt; and, accordingly, application is made to *Horace Earl of Orford* to remove it. It seems that *Earl Horace*, although ignorant of the true construction of the settlement, had not been altogether inattentive to his rights as to this estate; for the same doubt, with respect to the operation of the mortgage, had suggested itself to those who were his legal advisers; and, a year or two before this application from Lord *Clinton*, he had taken the opinion of counsel upon this point, and had

1817.

CHOLMONDE-
LEY
v.
CLINTON
and Others.

been advised, (as every lawyer who gave himself to the serious consideration of the subject must have advised him,) that the mere conveyance in fee for this purpose could operate no benefit to him, but would only give the additional security of a fee to the mortgagee. Lord *Clinton* then applies to him in the year 1794, to remove this unfounded doubt; and, being thus applied to, he consents to do that which was, (on his part) parting with nothing. He is called upon to execute a deed, to remove a doubt, which (he perfectly well knew) availed him nothing; and he executes the deed accordingly.

We will look first to the legal effect of this deed: it is a different question what would be its operation in a Court of Equity. It recites the settlement of 1781, the mortgage indenture of 1785, and the trust settlement made by Lord *Clinton* in 1792, for family arrangements; which last it was necessary to recite, because the trustees under that settlement were the then owners (as between them and Lord *Clinton*) of the legal estate; for which reason also they are made parties to the deed in question. It then proceeds thus,—“Whereas doubts have arisen,” &c. (See the statement of the case, *ante*.) The purpose of this deed of confirmation is here recited. It was a doubt, supposed to be thrown upon the title of Lord *Clinton* by the execution of the mortgage deed of 1785; and upon the application of *Horace* Earl of *Orford*, he agrees to confirm the uses of the settlement of 1781, “in the manner after-mentioned;” that is, that the trustees of Lord *Clinton*’s settlement shall continue to hold the estate “to, for, and upon such and so many “of the powers,” &c. “of the deed of 1792, as were then “capable of taking effect, in the same manner as if the “indenture of 1785 had not been made, and to and “for no other use, intent, or purpose whatsoever.” What can be plainer than that this language is a con-

1817.

 CHOLMONDE-
 LEY
 v.
 CLINTON
 and Others,

firmation, qualified, as nicely as words can qualify it, to the objection that had been suggested with respect to the operation of the deed of mortgage? Can any body doubt what would be its effect in a Court of Law? Could this be pleaded as a confirmation of Lord *Clinton's* title, otherwise than as that title might be affected by the indenture of mortgage? Is it a confirmation as against Lord *Orford*, in relation to any latent right which he might have? Can it be carried further than as to the mere operation of the mortgage deed? We are not, however, considering this question in a Court of Law, but in a Court of Equity. If, in a Court of Law, the confirmation is as general as language can express it; in a Court of Equity it is nothing, unless it be made to appear that the party making the confirmation was aware of the particular objection to the title of the party who required it. He who, in a Court of Equity, insists upon confirmation, must shew that the other party knew the particular defect, and meant to remove it. It is against all reason, that men are to be entrapped, in ignorance of their rights, into an alleged confirmation. The party relying upon it must show a clear intention to remove the particular doubt. In this case, there is no pretence that Earl *Horace* was aware of the objection which is an utter destruction of Lord *Clinton's* title. It is, on the contrary, apparent that he was in perfect ignorance of such an objection existing. And, even if this deed of confirmation could be pleaded at law, as going further than the mortgage deed, it must, in a Court of Equity, totally fail.

But it will perhaps be said, although Earl *Horace* did not know the particular objection at the time, yet, because he confirmed as against one defect, a general intention to confirm as against every defect of title must be presumed. As he willingly removed the defect sup-

1817.

CHOLMONDE-
LEY
v.
CLINTON
and Others.


posed to exist in relation to the mortgage deed, it must be presumed that, if this other defect had been then laid before him, he would have as readily confirmed the title of Lord *Clinton* against that also. In answer to that, I again say, the Court cannot infer what a man meant to do, or might have done. It is to look at the deed to see what he has done.


But, supposing the Court could address itself to the enquiry whether, if Earl *Horace* had been aware of the present objection to the title of Lord *Clinton*, he would have as readily removed that objection as he did that arising out of the mortgage; the objection to the mortgage was of no value. He had been advised by the late Lord Chief Baron, and the late Mr. *Shadwell*, that there was in truth no objection arising to the title from this mortgage. He knew, therefore, that he was parting with nothing; and then, because he was disposed to remove an objection, of which he could never take any advantage, the inference is drawn, that he would have as willingly removed an objection of which he might have taken an advantage to the extent of £20,000 a-year. This is enough to shew how idle are all such conjectures, if the Court could pay any attention to them.

III. The next doubt attempted to be raised as to the title of the Plaintiffs is this:—Suppose their title under the deed of 1781 admitted, and that the deed of confirmation operated nothing hostile to their demand; yet they come into a Court of Equity too late to make their title available. George Lord *Orford* died in the year 1791, and they do not file the bill till the year 1812, after twenty-one years have elapsed. The Defendants therefore contend, that the length of time is an answer to the demand of the Plaintiffs; not the length of time, as

applying to the case of mortgagor and mortgagee, for there is not the least pretence for such an argument. This mortgage continued outstanding in Sir *Edward Hughes* and his representatives till the year 1811, the mortgagee constantly receiving payment of the interest out of the rents and profits by the hand of Lord *Clinton*; and, in the year 1811, it was transferred to the Defendant, Sir *Francis Drake*, expressly as a mortgage, subject to the equity of redemption reserved by the deed of 1785. It is not therefore upon any such ground that the Defendants mean to insist upon the length of time, nor does the particular way in which they do mean to insist upon that objection appear upon the pleadings; but I presume they mean to say this;—Lord *Clinton* is a disseisor, who has had an adverse possession for above twenty years. Now, if there had been no mortgage title in this case;—if the Plaintiffs had had the legal estate in them;—if they had claimed by legal descent;—they then were barred from an action of ejectment, and a Court of Equity, which proceeds according to the principles of law, must therefore say that the Plaintiffs shall derive no advantage in equity from the circumstance of this legal outstanding estate,—that they shall be placed in no better situation from that circumstance, in a Court of Equity, than they would in a Court of Law, if there had been no legal outstanding estate.

The objection, thus stated, proceeds, in the first place, upon an affirmation which is directly contrary to the truth of the case; viz. that Lord *Clinton* is a disseisor of this estate, who has been in possession twenty years.—Lord *Clinton* is not a disseisor: there never has been any disseisin of this estate. The estate is held by Lord *Clinton* at this moment, not by the title of disseisin, and so the whole pretence fails, for the fact fails, upon

1817.

 CHOLMONDE-
 LEY
 v.
 CLINTON
 and Others.

1817.

 CHOLMONDE-
 LEY
 v.
 CLINTON
 and Others.

which it was grounded. Set the mortgage out of the case, and there would then have been a disseisin; but, in consequence of the mortgage, there has been no disseisin at law.

But, supposing this were such a case as that proposition assumes;—that Lord *Clinton* were a disseisor in possession, and that, twenty years having run, no action of ejectment would lie to assert the legal title of the Plaintiffs. Would no other action lie? If this had been a mere legal estate upon the death of Lord *Orford*, was there not a descent of the entire fee? And could not these Plaintiffs have asserted their title at law by another mode of proceeding, within an extent of time much beyond that which has here elapsed? Then what is the analogy which prevails between Courts of Law and Courts of Equity? A Court of Equity will give no relief where the remedy is at law; but, where the parties are compelled to seek relief in a Court of Equity, it will give the same relief by analogy, as a Court of Law would give if their title were a legal title.

But the main objection is, that Lord *Clinton* has never been a disseisor;—that the mortgagee has been in possession by the receipt of the rents and profits;—and that there was never a moment at which this mortgagee was disseised, or at which he might not have maintained his ejectment as against Lord *Clinton*. That Lord *Clinton* was never more than a mere tenant at will of the mortgagee;—that he could never have opposed his possession to the possession of the mortgagee;—that the possession of the mortgagee was, in fact, his possession, as the possession of the lessee is the possession of the lessor. Therefore, put the mortgage out of the question, and Lord *Clinton* would be a disseisor;

but the mortgage is in question, and therefore he is no disseisor.

1817.

CHOLMONDE-

LEY.

v.

CLINTON
and Others.

IV. These are the objections raised on the part of Lord *Clinton*, and the only objections on his part; but it is insisted, on the part of Sir *Lawrence Palk*'s representatives, claiming under the mortgage, that, supposing Lord *Clinton*'s title to be totally unfounded, yet their situation has peculiar equities which belong to it, and that their mortgage will prevail, though the title of Lord *Clinton*, from whom they derive that mortgage, should fail. They say that Sir *Lawrence Palk*, at the time he advanced his money upon this mortgage, which was three years after the death of Lord *Orford*, had no notice of any title whatever in Earl *Horace* adverse to the title of Lord *Clinton*; but that, on the contrary, he had a full persuasion that Lord *Clinton*'s was a good title. Why, who can doubt that? Would any body believe that Sir *Lawrence Palk* meant to advance £25,000 upon a bad title? But, because he advanced £25,000 to a person not the owner of the estate, did he therefore acquire a good title against the real owner, to the extent of this £25,000? Yet that is the title he asserts. However, in point of fact, even this ridiculous equity, for such I may term it, is not founded in truth. In point of fact, it is not true that Sir *Lawrence Palk* had no notice of the title upon which he lent his money. By the deed of 1781, Lord *Orford*'s title was communicated to him. His legal adviser fell into the same error which has so unaccountably prevailed with all parties as to the effect of that deed, and he lent his money upon a bad title, because he believed it to be a good one.

The other objections raised by this Defendant's answer are pretty much of the same nature—such as that of
VOL. II. P

1817.

CHOLMONDE-
LEY.


v.

CLINTON
and Others.

Earl *Horace* having permitted Lord *Clinton* to enjoy the estate as his own, under a claim of absolute ownership, and having full knowledge of the execution of the trust-deed of 1792. No doubt, he had full knowledge of that deed—for it is one of those, as to which he confirms the mortgage title. Then, his having, instead of questioning, confirmed the right of Lord *Clinton*, and having also lain by and permitted the Defendant to advance his money upon the faith and security of the title so claimed, and suffered to be enjoyed, by Lord *Clinton*. It is very true that Earl *Horace* did make no claim upon the estate from the death of Earl *George*, in 1791, to the creation of Sir *Lawrence Palk's* mortgage in 1811; but, because he made no claim for three years, does that give a title to Sir *Lawrence Palk*, or to the persons claiming under him?

But then, Earl *Horace* confirmed this estate to Lord *Clinton* and his trustees; and the Defendant here means to say, that he advanced his £25,000 in the confidence which he derived from the acquiescence of that nobleman, and from this deed of confirmation. Now, is that true? Did those legal advisers, whom Sir *Lawrence Palk* consulted, advise him to advance that money because *Horace*, Lord *Orford*, had lain by for three years, and then executed this deed of confirmation? They had before them the deed of 1781; and they advised him to advance his money, because they mistook the construction of that deed; because they fell into the strange common error which at that time prevailed among these parties. Really, all that can be said for the family of Sir *Lawrence Palk* is, that one must always feel regret when money is advanced upon a bad title; but they cannot, because it was advanced upon a bad title, have recourse against the real owner of the estate to make it good. Sir *Lawrence Palk* advanced his

money to Lord *Clinton*; and, if Lord *Clinton's* title fails, he must call upon him, and not upon the owner of the estate, to repay it.

1817.

 CHOLMONDE-
 LEY
 v.
 CLINTON
 and Others.

This is the whole of the case on the part of the Plaintiffs; and, upon this case they have been advised that they are entitled to the relief which their bill prays. They have been, as I think, well advised to file this bill; and well advised to consider the grounds on which it is framed, as grounds from which they never can be removed in a Court of Justice.

Roupell.

I. The settlement of 1781, notwithstanding the recital it contains, is a deed by which we submit to the Court, that *George Lord Orford* has done no more than to give to himself an estate tail, leaving in him the ultimate reversion in fee, of which he was seised at the time of making it. The settlement was purely voluntary; and by it the grantor reserved to himself a right to destroy the estate he created whenever he might think proper to do so. Now, in the light of a voluntary settlement, what construction can it receive in a Court of Equity, beyond that which a Court of Law would give to it? All the uses of the deed were uses executed.

George Earl of Orford was himself the right heir of *Samuel Rolle*; consequently the uses were executed in himself, as that right heir. Suppose the deed had been made by a stranger, with such a limitation of an estate for life to Lord *Orford*, with remainder to his heirs male, with remainder in fee to the right heirs of *Samuel Rolle*, there can be no doubt that the uses would have been executed immediately in him who was the right

1817.

CHOLMONDE-

LEY

v.

CLINTON
and Others.


heir of *Samuel Rolle* at the time of the deed being made, and the whole would therefore have vested in Lord *Orford*.

It is contended, however, that this ultimate limitation, if it were one, must be suspended for some indefinite period; for it cannot be stated at what period the estate was to vest, if it was not to vest immediately in him who was right heir of *Samuel Rolle* at the time the deed was made. Indeed if such a limitation had been made in a will, we know that the law would permit a suspension of the execution, and the heir at law would take in the mean time; but that is not the effect of a deed. There is here no contingency upon which there was to be any suspension of the reversion; but, it of necessity reverts to him who was the owner of the fee; and in truth it never passed from him, Lord *Clinton's* construction is of a totally different kind. He says, no—this vesting must be suspended until the death of Lord *Orford*, when the person who may then be described as heir at law to *Samuel Rolle*, will be entitled to these estates. He must show, however, that this deed has such an effect; and there is nothing in the deed itself to warrant it.

The Courts are not disposed, in any case, to favour suspensions of interest or contingencies. It is, on the contrary, the policy of Courts, in construing instruments of all kinds, rather to accelerate, than to retard, the period of vesting. This was stated as clear law, and admitted by the Court of *King's Bench*, in the case of *Phillips v. Deakin* (a), where Mr. *Preston* relied on the rule of law which inclines to accelerate the

(a) 1 M. & S. 744.

vesting of estates, and urged that the Court would therefore construe the words of the will in that case as descriptive of the time of taking, and not of the persons to take.

1817.

 CHOLMONDE-
 LEY
 v.
 CLINTON
 and Others.

II. This being, as I submit, the legal effect of the instrument of 1781, the transactions which followed it are next to be considered.

It is not for us, now, to contend that the uses of the voluntary settlement of 1781, were in fact revoked by the execution of the mortgage-deed of 1785; and yet it looked very much like it, being an instrument executed for securing a sum of money sufficiently secured already.

Be this as it may, a doubt was entertained as to the effect of this instrument; and Earl *Horace*, having been advised that, in fact, it was no revocation of the uses of the settlement, which still remained untouched; and not being at all aware that he had any interest under the deed of 1781; consented to execute a deed for the purpose of removing, out of the way of Lord *Clinton* and his trustees, this mortgage, and any supposed effect it might have upon the settlement. This was the deed of confirmation, under which the next question in this cause arises.

There was no consideration for this deed passing from Lord *Clinton* to Lord *Orford*. The latter had not the least conception that he was beneficially entitled. He conceived that there was a doubt whether the mortgage of 1785 had revoked the settlement of 1781; and what he was called upon to do by this instrument was to give effect to any acts of Lord

1817.

CHOLMONDE-
LEY
v.
CLINTON
and Others.

Clinton, or to confirm any estate he might have, as if that mortgage-deed had never been. It is quite clear that it was intended to have this effect, and no other. Beyond that, undoubtedly, there was no intention whatever present in the mind of Lord *Orford*. No man, reading this deed, could suppose that, for five shillings consideration, he would do an act which would give to Lord *Clinton* estates of the value of £20,000 a-year; yet that is the effect which a Court of Equity is called upon to give to the deed. If *Horace* Lord *Orford* can be considered as having meant that the estates should go to the right heirs of *Samuel Rolle*, how is such a meaning consistent with the acts that led to the execution of this deed? If he had intended to pass these estates to Lord *Clinton*, as being the maternal heir of *Margaret*,—if he had meant to give effect to the supposed intention of the deed of 1781,—would he have submitted to the opinion of counsel a case to ascertain whether the deed of 1785 were a revocation of the deed of 1781? If that had been his purpose, he might as well have executed the deed without asking any questions about the effect of the mortgage; but it is evident, by putting the question in the way in which he did put it, that he was ignorant of his right,—that he had not the slightest idea that he was interested. Can the Court, under these circumstances, say that the effect of the deed is to be carried beyond what, under the language of the deed itself, thus cautiously used, is fairly to be inferred, as to the purpose for which the deed was made? The obvious ignorance in which Lord *Orford* was when he executed the instrument, the ignorance in which he remained during his whole life, shuts out any other intention; and, with respect to the confirmation, it is impossible to contend that Lord *Orford* meant to

confirm that, of the existence of which he was so totally ignorant.

1817.

CHOLMONDE-
LEY
v.
CLINTON
and Others.

In Lord *Chesterfield v. Jansen (a)*, where the question was much considered, it is laid down, that a man ignorant of his rights, and of the circumstances attending them, cannot confirm any thing; and, in the case of *Cole v. Gibbons (b)*, the Court refused to relieve a man from a deed of confirmation, because he was aware of his rights, and a man under these circumstances is not entitled to any relief.


III. The next question is, with respect to the length of time which has elapsed since the death of *George Lord Orford*. Unless the party, who has done an act of this sort, was aware of his rights, how can he be barred by not having asserted his claim? There is no evidence before this Court to show that either *Earl Horace*, or those who claim under him, knew, from the death of *George Lord Orford*, in 1781, till the filing of the bill, that there was this right in them.

But Lord *Clinton* claims by length of possession—what then does that amount to?—and what is the possession itself but the estate and interest? If we are right in the construction we put upon it, the Equity of Redemption is in the Plaintiffs or one of them, and Lord *Clinton* can derive no estate or interest from the mere circumstance of receiving any of the rents.

His possession was in fact our own. Then how can we be affected by it? Here is a mortgage in fee, now subsisting in trustees; and the question is, who is

(a) 1 Atk. 301.

(b) 3 P. W. 290. 1 Ves. 503.


1817.

 CHOLMONDE-
 LEY
 v.
 CLINTON
 and Others.

entitled to redeem it? It is redeemable by some one; and Lord *Clinton* says he is the person entitled. He cannot show his title. Can he then derive any title from the circumstance of his paying interest to the mortgagee? The legal estate is in the mortgagee; and all the others are only equitable estates. There can be no equitable disseisin, as is laid down in the case of Lord *Grenville v. Blythe* (a); and Lord *Clinton* cannot show that he has a right to redeem. If the interest has been paid by him under the mortgage, he has done no more than Courts of Equity allow. The question then comes back to, who is the party entitled to the Equity of Redemption? And that party is one of the present Plaintiffs.

IV. The other Defendant, Sir *Lawrence Palk*, says, Whatever may be the effect of the settlement of 1781, and the deed of confirmation of 1794, he, having advanced his money upon the faith of Lord *Clinton's* title, is an equitable mortgagee of the estate! Sir *Lawrence Palk* has no legal estate; he has advanced his money upon a supposed title in Lord *Clinton*. He would have the Court suppose, he has advanced it upon the faith of the deed of 1794, but the deed under which he actually advanced the money, was the deed executed by Lord *Clinton* in 1792; and the mortgage-deed which Sir *Lawrence Palk* took from the trustees of Lord *Clinton* does not even recite the deed of confirmation. It was, therefore, not upon the faith of that deed that he advanced his money. It does not appear from the answer, when he advanced his money; but there is every reason to suppose that it was before this deed of confirmation was executed.

(a) 16 Ves. 224.

Shadwell.

1817.

 CHOLMONDE-
 LEY
 v.
 CLINTON
 and Others.

I. *George Earl of Orford*, at the time of the death of his mother, was tenant in tail male, under the will of *Samuel Rolle*, who devised this estate, first to his sons, and, in failure of male issue, then to his daughter for life, with remainder to her first and other sons in tail; and thus, being tenant in tail by purchase, the recovery which he suffered, the uses whereof were limited to him in fee-simple, made him the first purchaser in fee-simple. This was determined in *Martin v. Strachan* (a) and *Roe v. Baldwere* (b). I assume, therefore, that, by the recovery suffered in 1781, *George Earl of Orford* was tenant in fee-simple. Now, being tenant in fee-simple of this estate, he proceeds to settle it by the deed of 1781; and, it being admitted that he was then heir at law to his grandfather *Samuel Rolle*, the effect of that settlement, independent of any question upon the recital, is to make him tenant in tail, with remainder to such uses as he shall appoint, with remainder to himself in fee. That this is the direct legal effect of the limitation, was settled in the case of *Doe dem. Earl of Cholmondeley v. Masey* (c), which was a devise, in remainder, on failure of issue male of the last person named as tenant for life, "to such person and persons, and for such estate and estates, as should at that time be entitled to the rest of the testator's real estate by virtue of and under his will."

It was attempted to be argued, that the person entitled to take was the person who should be the party entitled by virtue of the limitations at the time that the limitations themselves had ceased; but it was held by

(a) 1 Wills. 66. 6 Bro. P. C. 319. (b) 5 T. R. 107.
 (c) 12 East, 589.

1817.


CHOLMONDE-
LEY
v.
CLINTON
and Others.

the Court, that that was not the construction, but that it was to be taken in the same way as if it were a real devise to the testator's right heirs; that the person entitled to take, clearly was the heir at law of the testator at the time of his death; and that it was in effect leaving the estate in question undisposed of.

It will, in this case, be argued, that there is so much clearness in the intent of the settlor, as expressed in the recitals of this deed of 1781, that it ought to controul the clear effect of the limitation; but it will be difficult to convince the Court that the intention is so clear. There is no designation of any particular individuals who should take, nor of the time at which they should take; but there is the common expression, that the settlor is desirous "the premises should continue and remain in the family and blood of his late mother;" and that, "in consideration of the love and affection which he bore unto his relations, the heirs of the said *Samuel Rolle*;" (without any specification of whom those heirs consisted,) "and to the intent that the manors and hereditaments might remain in the family of his said mother on the side or part of her father, *Samuel Rolle*; and in consideration thereof, he conveyed the said premises," &c. I apprehend that this is as weak a testification of intention to benefit any individual as can possibly be made. Whatsoever might be the settlor's intention, the limitation is to those persons whom he favours, preceded by a general power of appointment, and followed by a general power of revocation.

I submit that there is no such clear expression of intention, in the prior part of this deed, as will authorise any Court to say that it controuls the effect of the limit-

ation in the *Habendum* ; and I assume that, as he was at the time of the execution of this deed, the right heir of *Samuel Rolle*, it is quite clear, according to the whole tenor of the authorities, that the limitation has the same effect as if it were directly to himself in fee, or as if no limitation whatever existed.

1817.

 CHOLMONDE-
 LEY
 v.
 CLINTON
 and Others.

II. With respect to the mortgage-deed of 1785, the counsel to whom Earl *Horace* referred on the subject, advised that that mortgage had no other effect than to create an additional incumbrance, and that it did not at all disturb the uses of the settlement. It is quite superfluous to cite any cases in support of that proposition; the consequence of which is, that *George Earl of Orford*, when he died, had an equitable seisin in fee, which would descend to his heir *ex parte paternâ*, subject to the mortgage. It is extremely material that that proposition should be established; and I take it to be established by the circumstance, that, unless the fee-simple did descend to his heir, the heir must have taken as a purchaser. And it appears from several cases, which I shall have occasion presently to refer to, in *Co. Litt.* that, “if lands are given in tail to *A.*, the remainder to his right heirs, and *A.* dieth without issue, the collateral heir may bring a writ of right upon the seisin of the ancestor.”

On the death of *George Earl of Orford*, it appears that (in consequence of the mistake which then prevailed as to the effect of the settlement of 1781,) *Horace Earl of Orford* did not enter into the receipt of the rents and profits, but that (from the same mistake) Lord *Clinton* entered into, and had all the occupation of, the lands in question; but at that time the mortgage in fee was existing, and it continued to exist till the year 1811. The


1817.

CHOLMONDE-
LEY
v.
CLINTON
and Others.

cases which were afterwards submitted to counsel on the part of Earl *Horace* are important, as they show that he was entirely ignorant of any right he had, unless the mortgage-deed of 1785 had the effect of revoking the settlement, which it clearly had not.

Then follows the deed of 1794, as to which I shall only make one observation, and that is, that the deed appears throughout not a general deed of confirmation; because after having stated the pedigree of the late Lord *Clinton*, and after reciting the various deeds upon which it was supposed Lord *Clinton* was entitled, and the two sets of deeds of 1781 and 1785, and "that doubts had arisen," &c. "but *Horace* Earl of *Orford*, being well satisfied that "the late Earl did not intend to alter the uses limited "by the indenture of 1781, had, at the request of Lord "*Clinton*, agreed to confirm the uses of the said settlement in manner after-mentioned;"—the indenture witnessed, that, "in pursuance of the agreement, and being "desirous to confirm the settlement of 1781, he granted "to such uses, and in the same manner, as if that indenture of 1785 had not been made, and to and for no "other use, intent or purpose whatsoever." The legitimate rule of construction is not to reject any words, if it is possible to give them a clear distinct meaning; but these last words must absolutely be rejected, as having no meaning at all, if the interpretation is to prevail, which the Defendant contends for. If they be not rejected, but are considered as having some meaning, then the Court can only put one meaning on them, namely, that the indenture executed, and the uses created by the deeds of 1792, shall be confirmed in a limited manner, "in the same manner as if the indenture of 1785 had not been made." Now what is the mode in which it would have been confirmed if that in-


denture had not been made? The party supposes, that the deed of 1785 had revoked the deed of 1781; and he executes a deed for the purpose of removing that doubt. It is clear, therefore, that it is only meant to give validity to the uses created by Lord *Clinton*, as if there had been no incumbrance at all.

1817.

CHOLMONDELEY
 v.
CLINTON
 and Others.

III. After the settlement of 1794, further deeds are executed for various purposes; and, all the while, the mortgage is subsisting as an acknowledged mortgage. Now, supposing there had been no mortgage, upon the death of *Horace* Earl of *Orford*, Lord *Cholmondeley* (being his heir at law, and being the heir at law of *George* Earl of *Orford*,) although he suffers more than twenty years to elapse before he takes any steps to recover possession, might, under the limitation of the deed of 1781, still have brought his writ of right for that purpose. Lord *Coke* puts several cases, in which a writ of right may be brought; and the first is this. "Lands are letten to *A.* for life, remainder to *B.* for life, remainder to the right heirs of *A.* *A.* dieth, *B.* entereth and dieth, A stranger intrudeth. The heir of *A.* shall have a writ of right of the seisin which *A.* had as tenant for life (*a*).” I quote this for the purpose of showing that, notwithstanding there be not an integral estate of fee-simple in possession, yet where an ancestor has taken an estate of freehold, and there is such a limitation to his heirs, as that, upon his death, the heir must take by descent, the heir shall, in such case, have the power of bringing a writ of right, in the same manner as if his ancestor had had the fee-simple.

In the same page Lord *Coke* says, “If lands are letten to *A.* and *B.*, and to the heirs of *A.* and a

(a) Co. Litt. 281. a.


1817.

 CHOLMONDE-
 LEY
 v.
 CLINTON
 and Others.

"recovery is had against *B.*; the heirs of *A.* shall have
 "writ of right of the whole; for every joint tenant is
 "seised *per my et per tout.*"

Then the third case he puts is this—"If lands be
 "given to one in tail, the remainder to *A.* in fee, the
 "donee dieth without issue, his wife *privement ensient*;
 "*A.* entereth, the issue is born, and entereth upon
 "him, and dieth without issue; *A.* shall have a
 "writ of right of the seisin which he had;" and that
 is the case in which the person in remainder enters
 prior to the time, when by the events that happened,
 he actually had the fee-simple in possession; but
 although, *ex vi termini*, he had got possession by tor-
 tious seisin; that shall be sufficient to enable him to
 bring a writ of right.

Then Lord *Coke* puts this case, which I consider
 quite in point. "If lands be given in tail to *A.*, the
 "remainder to his right heirs; *A.* dieth without issue,
 "the collateral heir of *A.* shall have a writ of right of
 "the seisin of *A.*" Now it is very remarkable that, by
 all these four cases, Lord *Coke* takes the right to bring
 this peculiar writ to depend upon the seisin; and the
 words are remarkable, because the demandant in a writ
 of right must allege seisin in himself or his ancestors.
 (*Fitzherbert's Natura Brevium*, p. 11.) But, where *for-*
medons in remainder and *reverter* are spoken of, different
 language is used. In *Fitz.* p. 499. a variety of cases
 are put, in which the writ of *formedon in remainder* is
 stated; and they all are cases in which the remainders
 are remainders strictly speaking,—cases, in which the
 donee has no preceding estate whatever, but the par-
 ticular estate is to one, and the remainder is to an-
 other. And, when the book speaks of *formedons in*
reverter, (p. 503.) it has specified very clearly what is

the notion of that reversion. It appears by cases there put, where the writ of *formedon in reverter* is the subject, that, when a donor makes a limited gift to a third person of his inheritance, and the inheritance afterwards falls to strangers, the donor, or his heir, is entitled to bring the *formedon in reverter*, and several cases are put, which all substantiate, that, where that writ is to be brought, is in cases of this limited description only. I therefore adverted particularly to the language of that writ, because Lord *Coke* says, "in all cases where "there is a seisin," (and it would be quite inconsistent with the known rule of law if it were otherwise) "his heirs must take by descent, and not by purchase." I assume, therefore, that upon this state of things, if there had been no legal estate outstanding, Lord *Cholmondeley* might, as heir at law of *George Earl of Orford*, have brought his writ of right.

1817.

**CHOLMONDE-
 LEY**
 v.
CLINTON
 and Others.

The question then is, whether, in a case where a person might bring his writ of right, as possessed of lands, he may, under the circumstance of the legal estate being outstanding, bring his bill for relief to have the legal estate removed, or to have it set up, so that he may be at liberty to proceed upon his legal right. I do not find any general rule by which Courts of Equity have restricted themselves to granting relief to the period of twenty years from the time the right accrued.

In *Collins v. Goodall (a)*, where a bill was brought touching quit-rents unpaid for forty years, the Defendant pleaded the statute of limitations, and it was held it did not apply. This must have been the statute of *James I.*; for the answer was, that that statute did not apply to rent, which could not have been the true answer if the statute of *Henry VIII.* had been intended,

(a) 2 Vern. 235.

1817.

CHOLMONDE-
LEY
v.

CLINTON
and Others.

because in the first section of that statute, rents are referred to, and the subsequent sections speak of "rents, suits and services." I must therefore assume that, in the case of *Collins v. Goodall*, the Court thought the statute of *James* could not apply, and that the mere lapse of so many years was not a bar.

I am fortified in this position by Your Honour's judgment in *Stackhouse v. Barnston (a)*, and by the case of *Eldridge v. Knott (b)*, which is there cited.


There are, however, a variety of cases, both ancient and modern, in which it has been held that a Court of Equity does assimilate itself to the rules which prevail at law; and, if there be no reason in this case why a writ of right should not be brought, supposing the legal estate were not outstanding, I ask why the rule should not be applied, so as not to exclude Lord *Cholmondeley* from the relief which he prays as heir at law, or by virtue of his arrangement with Mrs. *Damer* as devisee in fee? The mortgage in question subsisted, in 1811, in Sir *Edward Hughes* and his representatives; and, in November, 1811, it appears, Lord *Clinton* took from the infant heir of Sir *Edward Hughes*, the legal title to the estate in question,—but not to himself. He did not pretend to have a title to redeem, although he paid off the mortgage money; but there was a reference to the Master to ascertain whether the infant was heir within the meaning of the statute of *Anne*, and, upon his Report, this conveyance was executed between the executors and trustees of Sir *Edward Hughes* and Sir *Francis Drake*, by which, in consideration of a sum of money paid by Lord *Clinton*, which was then due to the executors of Sir *Edward Hughes*, the infant conveyed

(a) 10 Ves. 467.

(b) Cowp. 214.

to the use of Sir *Francis Drake*, his heirs and assigns for ever; "subject nevertheless to the same or the like benefit and equity of redemption on payment of £20,000 and interest henceforth to grow due for the same, as the said manors, &c. are now held by the said, &c." (executors and trustees of Sir *Edward Hughes*), "or any or either of them, under or by virtue of the said hereinbefore in part recited indentures of 1785, &c." (the deed that first created the mortgage in fee), "except so far as the right to the said sum of £20,000, and the interest henceforth to become due for the same, is altered or varied by these presents." This, therefore, was the most clear and explicit recognition, on the part of Sir *Francis Drake*, who by his answer states that there was a right of redemption under the deeds of 1785 which Lord *Clinton* did not assume. The estate is then assigned to persons, in trust to protect the interest of Sir *Francis Drake*, assuming that he was the real mortgagee, for the clear residue and remainder of the term of two hundred years; "upon such and the same trusts, and for such and the same intents and purposes, and subject to the same benefit and equity of redemption, as they had been held by virtue of the deed of 1785, except so far as the trusts are altered by that deed." I submit, therefore, that at this time, (in 1811) Lord *Clinton* did not feel himself qualified to ask that the conveyance should be made to him. He endeavours to protect his interest in the estate; he pays off the mortgage; but he does not, upon the face of this deed, treat himself as entitled absolutely to it.

Now, it was decided by Your Honour, in the case of Lord *Grenville v. Blyth* (a), that there can be no equit-

1817.

 CHOLMONDE-
 LEY
 v.
 CLINTON
 and Others.

(a) 16 Ves. 224.

1817.

CHOLMONDE-
LEY
v.
CLINTON
and Others.

able disseisin; and, though there be an adverse possession in a mortgagee for a series of years, yet, if there be a recognition within that period, even as between the mortgagee and a third person, that the mortgaged estate is redeemable, the heir of the mortgagor is, in such case, entitled to redeem. This, I apprehend, Your Honour decided in the case of *Hensard v. Hardy* (a), which took its rise out of the decree in *Hardy v. Reeves* (b), in the report of which last case the particulars are stated. It was there pressed, that the heir of the mortgagor had no right whatever to avail himself of his title to redeem, because the recognition of the estate, as a mortgaged estate, had not taken place between him and the parties under whom he claimed. However, after discussion of some of the points, Your Honour is reported to have said, "The *Hardys*, having a questionable title, suffered themselves to be turned out of possession, and acquiesced during several years in the possession obtained by *Reeves*. This was considered an acquiescence in the claim of ownership by *Reeves*, as he had nothing to do with the estate unless he was owner; and the submission of the mortgagor to be turned out of possession, and his acquiescence in continuing out of possession, are no recognition that the possession obtained and kept is that of the equitable owner" (c).

This is the proposition upon which I rely in the present case. Here has been no turning out of possession by reason of any legal proceedings. The utmost this case can amount to is, that Lord *Clinton* entered because he thought he was entitled, and Lord *Orford* did not enter because he did not think he was entitled; and

(a) 18 Ves. 455.

(c) Page 461.

(b) 4 Ves. 466. 5 Ves. 426.

twenty years elapsed before he found it out. In *Hansard v. Hardy*, it was held that, notwithstanding there had been six and thirty years' possession, the party was entitled to redeem. Now I submit that, in the present case, upon the joint title of Lord *Cholmondely* and Mrs. *Damer*, there is nothing which bars them from redeeming this estate. I take it in law, that those who are in possession as mortgagors, are merely the tenants from year to year of the mortgagee, who may, without notice, bring an action of ejectment, and turn them out of possession. His right to possess preserves that of the persons who are entitled to redeem; and those persons, in the present case, are the Plaintiffs.


1817.

CHOLMONDE-
LEY
v.
CLINTON
and Others.

Sugden.

I. Upon the first question, as to the construction of the deed of 1781, and of the ultimate limitation in that deed to the right heirs of *Samuel Rolle*, it may be necessary to take some notice upon what foundation the rule stands, which is contended for by the present Plaintiffs.

The common law always encouraged the vesting of estates and discountenanced the creation of contingencies. All the rules relating to contingent remainders had this in view only. There was no necessity that an estate should vest *eo instanti* on the determination of the preceding estate. There was no objection, that I am aware of, to the limitation of a possibility upon a possibility. But all these rules resulted from the anxiety of the common law, that estates should go in a course of descent, from ancestor to heir, and to prevent them from vesting in the latter by purchase. It was with this view that it became a solemn and established rule of law, that no man should make his own right heir, either in tail or in fee, a pur-

1817.

 CHOLMONDE-
 LEY
 v.
 CLINTON
 and Others.


chaser, without parting with the whole fee-simple out of himself.

These rules certainly took their origin from feudal tenures; but they were followed by Courts of Equity before the statute of uses; [Bro. ab. title *Gard.* pl. 6.] and, after the statute, (as it is laid down in Co. Litt. 22. b.) the law continued the same.

The subject was very fully discussed in *Fenwick v. Mitforth* (a), where there was a fine by A. to the use of his wife for life, with remainder to the eldest son in tail male, with remainder to the use of A.'s right heirs for ever. It was agreed that, by the limitation to his own right heirs, the conusor of that fine could not have meant his eldest son, because he had already given to him a particular estate; but, upon the conference of the twelve Judges, it was held that this limitation to the right heirs was merely void, because the use still remained in him, and the statute executes the possession to the use in the same manner as the use was limited. So also in the Earl of *Bedford's* case (b), where the difficulty was, that the grantor had taken to himself an estate for years; but that was held to make no difference as to the effect of the ultimate limitation to his own right heirs, the case being that of a conveyance to uses. In *Pybus v. Mitford* (c), the great point was, that it was not a limitation to the heirs general, but to the heirs special; but the anxiety of the Court to make it take effect immediately, induced the presumption that an estate for life was implied, and that it was, in effect, a limitation to the grantor himself of an estate tail immediately vested in him. That certainly was a very strong

(a) Moor, 284. 1 Inst. (b) Moor. 718. Jenk. 248.
 22. b. 1 Leon. 182. (c) 1 Vent. 372.

case; but, so far from its authority being weakened by later decisions, they have all tended to strengthen it. The same rules are followed by analogy in Courts of Equity.

1817.

 CHOLMONDE-
 LEY
 v.
 CLINTON
 and Others.

It will be said, that the present case is different—that, here, the limitation by *George Earl of Orford* is not to his own right heirs, but to the right heirs of *Samuel Rolle*. But where is the distinction? *A.* being the heir at law of *B.*, who is dead, makes a settlement, by which he creates a particular estate, and limits the reversion to his own right heirs. Nobody doubts that that limitation is merely inoperative, and that the reversion continues in himself, as if no such limitation had been made. Now, suppose he makes a settlement in the same way, only limiting the reversion to the right heirs of *B.*, which is our case. Is it not precisely the same thing? Or is the rule of law to be thus evaded and trifled with?

Several cases are put by Lord *Coke*, which bear strongly on the present. “It is holden by some opinions, that if there be grandfather, father, and son, and lands are given to the grandfather and to his heirs begotten by the father, the father dieth, the grandfather dieth, the son is in, as heir to the grandfather begotten by the father; and the wife of the grandfather shall in that case be endowed. But certain it is, that in some cases one shall have the land *per formam doni*, that is not issue of the body of the donee.” This proves that the estate vested in him, though the limitation was not to the heirs general; otherwise the wife could not have been endowed (*a*). “If a man hath issue a son, and dieth, and land is

(a) Co. Litt. 20. b.

1817.

CHOLMONDE-
LEY
v.
CLINTON
and Others.

" given to the-son, and to the heirs of the body of his
" father begotten; this is a good entail, and yet the
" father was dead at the time of the gift" (a). So that it
might very well have been said, the intention was to
give the son only an estate for life; but the rule of
law was too powerful for the intention.

" If a man hath issue two daughters, and dieth
" seised in fee-simple, and the one coparcener giveth her
" part to her sister, and to the heirs of the body of her
" father; in this case, the donee has an estate tail in the
" moiety of the donor's part, for the donee is not the
" entire heir, but the donor is heir with the donee, and
" she cannot give to the heirs of her own body; and
" the donee hath the other moiety of her sister's part
" for life" (b). This is as strong a case as it is possible
to put, because the person who took the moiety was only
co-heir of the person of whose body the heirs were to
be. Again (c), " If there be a grandfather, father, and
" son, and the father dieth, and lands be given to the
" son, and to the heirs of the body of the grandfather,
" this is a good estate tail in the son." All these cases
point at the same conclusion, and prove that the heirs
shall take at the time the limitation is made. [See also
Litt. sec. 352 and 353.]


Now there is this strong distinction between all these
authorities and the present case;—that those were cases
of limitations to the heirs special, while this is to heirs
general. Yet there are many cases that heirs special
might take as purchasers, under circumstances, in which
it would be quite impossible to contend that heirs general
could take as purchasers.

(a) Litt. §. 30.

(c) 27. a.

(b) Co. Litt. 26. b.

To show how anxious the law is to vest estates, I would also refer to 2 *Rolle's Abridgement*, 415. D. where the rule of law appears most strongly to be, that, when a man makes a limitation, however remote, if there be a person capable of taking under that limitation at the time the deed is executed, that person takes.

1817.

 CHOLMONDE-
 LEY
 v.
 CLINTON
 and Others.

Next, on the question of intention, I submit, that there is no recital of intention in this instrument made by Lord Orford. There are only a few words in the operative part of the deed, which differs altogether from a recital; and, if the effect of these words be considered, they will appear to be extremely inoperative, since the desire which seems to be expressed by them is made subject to the unlimited power over the estate reserved to himself by the grantor; so that, even if the limitation were to receive the construction contended for by the Defendant, it would, at the time, have been of no value at all, even to those who are represented to have been the peculiar objects of the grantor's favour. How can it be contended that a Court is to stretch the rule of law in favour of objects for which so little anxiety is manifested? But, waving that consideration, I say that every rule of law is against the Court cutting down the direct sense of such a limitation. In *Pybus v. Mitford* (a), Lord Hale observed, "that it is not the intention of the party that shall control the operation of "law." The same argument was addressed to the Chief Justice in that case, which will be addressed to Your Honour in this. And, in the case of *Roe v. Aistrop* (b), in answer to a similar argument, Chief Justice De Grey says, "There is, indeed, reason to suppose that the parties might not mean the two estates to go in a different channel; but this is only a supposition, and,

(a) 1 Vent. 372.

(b) 2 Blackst. 1228.

1817.

CHOLMONDE-
LEY

v.


CLINTON
and Others.

“if certain, still, as this is a legal estate, it is not in the power of the parties to alter the legal course of descent.”

The same rule prevails as to devises, which appears from *Hodgson v. Ambrose* (a), where Mr. Justice Buller said, “If a testator make use of legal phrases or technical words only, the Courts are bound to understand them in the legal sense — they have no right or power to say that the testator did not understand the meaning of the words he has used, or to put a construction upon them different from what has been long received, or what is affixed to them by law,” so that, even if this had been a devise, it would not be in the power of the Court to give a different effect to the words than the rule of law authorises. But it appears to me, that the supposed intention, which they say would be effectuated by the construction for which they contend, would not be effectuated by that construction. If the vesting of the limitation is to be postponed, it must be to one of two periods — either to the death of *George Earl Orford*, or to the failure of his issue, and of any limitations which might be created under the power. Now, the right heir of *George Lord Orford*, at the time of his death, might, and (if he had had any), would have been his issue. What then would have become of his intention? Would a larger estate have been taken under this limitation? No. It might happen that a much less valuable estate would have been taken; and other persons might have been let into this estate in preference to the blood of his mother. Put this case, that *Lord Orford* had left a grand-daughter, the daughter of a daughter. It is perfectly clear that, if this limitation did not vest in *Lord Orford* himself, it must have taken

(a) Dougl. 337.

effect as a feoffment; and then, the grand-daughter claiming under the daughter, would have taken by purchase; and, upon her death, her paternal heirs would have taken before her maternal heirs; and thus the rules of law would be twisted and turned to let in a whole line of heirs who would take to the utter exclusion of those whom Lord *Orford* is supposed to have been so anxious to provide for.

1817.

 CHOLMONDE-
 LEY
 v.
 CLINTON
 and Others.

Suppose it were not to vest at the death of Lord *Orford*, but at any other indefinite time; still it must be the issue claiming through the female that would take, and the same consequence would inevitably follow. [See the case put in Co. Litt. 18. a.]

If the construction for which we contend is to prevail, the probability is, that a greater line of heirs of Lord *Orford's* mother, on the part of her father, would take, than under any construction that the Defendants can put upon this deed. If, then, the Court can be called upon to exercise its judgment, and give effect to the intention, what is there here that should induce the Court to go out of its way to put a contrary sense on this limitation to that which it would receive in an ordinary case? In *Doe v. Maxey* (a), Mr. Justice *Bailey* observes, "It is a settled rule not to read a limitation in a will as being a contingent remainder, unless such appears clearly to have been the intention of the testator; but, if it will admit of being considered as a vested remainder, the Court will always read it as such, because a contingent remainder is always liable to be defeated, and the intention of the testator thereby frustrated." So that, even in a will, if a limitation can take effect, the Court will always give

(a) 12 East, 604.

1817.

CHOLMONDE-
LEY
v.

CLINTON
and Others.


effect to it; but the rule of law is much stronger with regard to a deed. Then he says, "It is not likely, if "he looked to his next immediate heir in the first "clause, that he should be looking, in the clause in "question, to such person as would be his heir at the "time of the death, not merely of Lord *Brownlow* "Bertie, but of Lord *Brownlow Bertie* without male "issue." And again, "It is not likely that the test- "ator should have looked to so indefinite a period for "the vesting of this remainder." Exactly the same principles would apply in this case, and it would be impossible to suppose that Lord *Orford* was looking to a cousin a hundred times removed, at the distance perhaps of a century. I have already said that, so far from effectuating the intention, such a construction would let in lines of heirs who never could take according to the words of the deed.

In 2 Roll. Ab. 417. pl. 6. there was a limitation to *A.* for life, with remainder to the right heirs of him and *B.*, *B.* being alive; and it was held to be executed, for a moiety, in the heirs of *A.*, without awaiting the death of *B.*, although there was strong ground to contend that the limitation to the right heirs of both was intended to take effect in the same way, and, *B.* being alive, it was impossible that his heirs could then take (a).

In Co. Litt. 378. b. there is another strong instance of this anxiety to vest the estate in the ancestor. "If "land be given to *A.* and *B.* so long as they jointly to- "gether live, the remainder to the right heirs of him "that dieth first, and warrant the land *in formis præ-*

(a) In Rolle's Abridgement, where this case is referred to by the name of *Clark v. Duvy*, 37 Bl. B. R. it is, however, marked with a "dubitat.".

"dictâ, A. dieth, his heirs shall have the warranty;
 "and yet the remainder vested not during the life of A.
 "for the death of A. must precede the remainder, and
 "yet shall the heirs of A. have the land by descent."
 It is scarcely possible to put a stronger case, a case in
 which the limitation itself was contingent, and was not
 to arise till the death of the person whose heirs were
 to take; and yet the law says, that it gave a descend-
 able quality to the estate, and that the heir should
 take through the ancestor and not by purchase.

1817.

 CHOLMONDE-
 LEY
 v.
 CLINTON
 and Others.

There is a very strong line of cases, to show the anxi-
 ety of the law to vest, and give a present operation to
 all words relating to heirs; those in which the limitation
 is *per verba de præsenti*; where, although the giving
 effect to them as words *de futuro*, would at least have
 the merit of effectuating the intention, and the conse-
 quence of construing them as words *de præsenti* is alto-
 gether to defeat the limitations, yet the Courts do not
 hesitate to give them that construction which is war-
 ranted by law. *Lamb v. Archer* (a), *Goodright v. Cor-
 nish* (b).

Another line of cases, which seems strongly to bear
 upon this part of the argument, is that which follows
 the decision in *Colson v. Colson* (c), which was a devise
 to C. for life, remainder to trustees to support contin-
 gent remainders during the life of C., remainder to the
 heirs of the body of C. And this was held an estate
 tail in C., though, if any thing were meant by the
 interposition of the trustees to preserve contingent re-
 mainders, it could only be referred to an intention to
 give him a mere estate for life. In that case of *Colson*

(a) 1 Salk. 225.

(b) 4 Mod. 256

(c) 2 Stra. 1125. 2 Atk.

246.

1817.

CHOLMONDE-

LEY

v.

CLINTON

and Others.

v. Colson, the Attorney-General of the day said he would put the strongest case possible. A devise to *A.* remainder to his heirs; and that the testator should by express words say, I intend the heirs to take by purchase. Yet even that would not prevail against the rule of law, that heirs cannot take as purchasers.

There is another line of cases upon gifts to relations, which are also much in point. The first is *Doe v. Lawson* (*a*), where, although the nephew, to whom a prior estate for life had been given, was himself one of the next of kin of the testator, and therefore the limitation "to such persons as should appear and be proved to be his next of kin," strongly appeared to refer to such as would be the next of kin at the death of the nephew, yet the limitation was construed to be to the next of kin at the testator's death; and there the words used were words *de futuro*, and it was the case, not of a deed, but of a will. (See the observations of Lord *Ellenborough* and Mr. *J. Le Blanc* upon this case.) Of this class also are *Holloway v. Holloway* (*b*), (in which see particularly Lord *Alvanley's* judgment,) *Jobson's* case (*c*), *Perin v. Pearse* (*d*), *Doe v. Colyear* (*e*). The well-known case of *Smith* dem. *Dormer v. Parkhurst* (*f*), is also a very strong instance of the same kind. There it was held that a limitation to *A.* for life, with remainder to another during the life of *A.*, is good; and that the remainder is a vested estate, notwithstanding the seeming inconsistency of the two estates, and, although it was strongly argued that it was impossible it should vest till there was a forfeiture of the estate for

(*a*) 3 East, 278.(*b*) 5 Ves. 399.(*c*) Cro. Eliz. 576.(*d*) 2 Roll. 256.(*e*) 11 East, 548.(*f*) 3 Atk. 135. 4 Bro.

P. C. 353. 18 Vin. Ab. 413.

Fearn's C. R. 328. (et seq.)

life. If then, in such a case as that, the anxiety of the law to vest estates caused it to be decided that the limitation to the trustee was a vested remainder, how can it be said, in the present case, but that, even if there were such an intention as the Defendants presume, the rule of law must take effect? Every man must deplore that Lord *Clinton* should sustain the loss which, I think, he must sustain; but it affords no ground of charge against the Plaintiffs; and it would not sound well to say, because you have suffered a person to make an advantage of several hundred thousand pounds out of your estate, therefore you shall give him the estate altogether. That is a sort of moral claim which I cannot understand. There are cases of great hardship, indeed, in which the rule of law has nevertheless been made to take effect. For instance, *White v. White (a)*, *Peters v. Maskam (b)*.

Now the ground which appears to be taken, or which will be taken, as I imagine, on the part of the Defendants, that the Court will endeavour to effectuate the intention for the benefit of this class of heirs, is a ground which, I apprehend, does not call a Court into action. A Court of Law, and also a Court of Equity, is perfectly indifferent as to what class of heirs may take—they must stand or fall, not by the force of favour, but by the effect of the instrument. *Selby v. Alston (c)*, *Goodright v. Wells (d)*. In the latter case, indeed, there is an observation made by Mr. Justice *Willes*, which is in favour of Lord *Cholmondeley*, “that he did not agree “to the proposition that there is no difference as to the “different heirs; that, when the question is between “those of the paternal, and those of the maternal line,

1817.

CHOLMONDE-
LEY
v.
CLINTON
and Others.

(a) 1 Bro. C. C. 219. n.

(b) Fitzgibb. 156.

(c) 3 Ves. 339.

(d) Dougl. 771.

1817.

CHOLMONDE-
LEY
v.
CLINTON
and Others.

"the law always gives the preference to the former." And, therefore, if there is any thing to be thrown into the scale on either side, it is, in point of construction, to be thrown into the scale of the paternal to the exclusion of the maternal heir.

I suppose we shall hear on the other side cases which, the moment they are stated, will be seen to be inapplicable. I allude to them, because I think my learned friends will find it difficult to cite any cases which it would not be very easy to distinguish from the case before the Court; as *Burchett v. Durdant* (a), *Darbison v. Beaumont* (b), and *Goodtitle v. White* (c), all which are cases designating the persons to take as the heirs of the body of a person now living. They have no bearing on this case, but are all decided upon the principle of their being distinct gifts to the person.

Perhaps we may also hear of cases in which a remainder expectant on an estate in tail male is held to go to the person who shall be heir at the time of the determination of the estate tail; but, in those cases, the estate goes to that person, not as a purchaser, but by descent. The principle is, that in all these cases, the estate is expressly (though in most instances imperfectly) limited to the person who should be heir at the time. It was so in *Thelusson's* case, and I am not aware of any case, where effect has been given to such a limitation, except where the person has expressly pointed to such person as shall answer the description at the time the estate is to vest,


(a) 2 Vent. 811. 2 Lev. 232.

(c) 2 New Rep. 363. 15

(b) 1 Bro. P. C. 489. 1 East, 174.

P. W. 229. 8 Vin. Ab. §15.

II. On the second point in the case, as to the effect of the deed of confirmation; the object of that deed, independent of the recitals which narrow its operation to the mortgage made by *George Lord Orford*, is expressly to give effect, not to *Lord Clinton's settlement*, but to the deed of 1781. If, then, the construction of that deed be as we contend, the only operation of the deed of confirmation would be to strengthen the Plaintiffs title. This deed, therefore, if it does not assist our title, clearly does not defeat it, or put it in a less certain shape than it stood before. But, supposing there were any distinction between the legal effect of this deed, and its effect in equity, we should then have to consider the effect of deeds executed by parties under a misapprehension of their rights; and the cases are uniform and decisive, as authorities in favour of deeds executed under such circumstances having no operation whatever. The first is *Bingham v. Bingham* (a), which was as nearly like the case now before the Court as is possible to be found. Yet there the Court gave relief, although the party was guilty of no fraud, and had a *bona fide* apprehension that the right to the estate vested in himself; and although the money was actually paid, and the conveyance executed; and the relief was given upon the mere ground that it was evident the Defendant had mistaken his title. The next was *Lansdown v. Lansdown* (b), where the *Lord Chancellor* decreed a bond and deeds of lease and release to be delivered up, being obtained by mistake and misrepresentation; and His Lordship said, that "the maxim of law, *Ignorantia juris non excusat*, was in regard to the public, that "ignorance cannot be pleaded in excuse of crimes, but "did not hold in civil cases." In that case, indeed, there was misrepresentation; but the former case of

1817.

 CHOLMOND-
 LEY
 v.
 CLINTON
 and Others.

(a) 1 Ves. 126.

(b) Mosel. 364.

1817.

CHOLMONDE-

LEY

v.

CLINTON
and Others.

Bingham v. Bingham was entirely free from that ingredient.

The case of *Pusey v. Desbouverie* (a), is also very strong, where the *Lord Chancellor* held, that notwithstanding the releases which had been executed, yet, as they were executed in ignorance of rights, the Court must necessarily relieve against them.

In *Broderick v. Broderick* (b), although it was proved by the declaration of the heir at law, that he knew the will was not duly executed, and with that knowledge executed a deed confirming the title of the devisee, yet the Court relieved.

In *Cocking v. Pratt* (c), an agreement concerning a distribution of personal estate, which was afterwards ratified, was set aside, because the party was ignorant, at the time, of the amount.

Upon these grounds, I contend, first that the legal effect of the deed is in our favour and not against us; and, secondly, that if Your Honour shall be of opinion it is against us, yet, upon the authorities I have mentioned, the Court will clearly relieve Lord *Cholmondeley* from the effect of it.


III. As to the length of time—although I think it perfectly easy to maintain, considering this as a legal title, that we should not be barred from any of our rights and remedies beyond an ejectment, I shall not enter into this question, because it appears to me that our title is distinct from any bar which may be attempted

(a) 3 P. W. 315.

(c) 1 Ves. 400.

(b) 1 P. W. 239.

to be raised on the ground of non-claim. At *George Lord Orford's* death, the legal estate in fee was outstanding in a mortgagee. Now it is clear that a mortgagor, entering after a mortgage, stands in the relation of a tenant at will to the mortgagee. If, then, we had entered ourselves, we should have been only tenants at will to the mortgagee, and it is clear that Lord *Clinton* entered only claiming the same relation. It is impossible he can put his case higher. There was no disavowal of the legal estate. He not only paid the interest on the mortgage, but in 1811 caused a transfer to be made, thus treating it as a valid mortgage. Now if, at law, he held only as tenant at will, what were his rights in equity? It has been held at law (*Doe v. Danvers* (a), that, if, at the death of the testator, there is a lease in being, which is acknowledged, a devisee may enter twenty years after the expiration of the lease—that payment of rent to another is immaterial, nor is he bound to enter for a forfeiture; and *Gilbert* gives the reason for this, in a manner which applies exactly to the equity that will be contended for here. They say that Lord *Clinton* did, by a wrongful entry, get—not the legal estate, (because that is at this moment outstanding in a third person,) but an equitable estate.

1817.

 CHOLMONDE-
 LEY
 v.
 CLINTON
 and Others.

Now I deny the possibility of barring an equitable estate, while the legal estate remains untouched. See *Lord Grenville v. Blythe* (b), where it appears, from what is reported to have been said by Your Honour, that the thing to be ascertained is, whether, by the rule of this Court, the party has, or has not, the equitable right. If he have the equitable right, though not clothed with possession, still he has a title to relief in this Court.

(a) 7 East, 299.

(b) 16 Ves. 224.

1817.

CHOLMONDE-
LEY

v.


CLINTON
and Others.

In Lord *Pomfret v. Lord Windsor* (a), a bill for an equitable demand was maintained under very strong circumstances, at a distance of twenty-seven years, and that, although a fine had been levied. (See Lord *Hardwicke's* observations in his judgment.) There Lord *Hardwicke* in a stronger case than the present, because a longer time had elapsed, held, there was no adverse possession, because the possession of the persons who claimed adversely, was in effect the possession of the trustees for the person who had the right. If a person, supposing he has a claim to an equitable estate, claims any thing beyond it, he must put his case in one of two views—either that he entered wrongfully, knowing he had no right, or that he entered by mistake. If the former, it would be impossible for him to come into this Court, and ask to be permitted to make use of the real estate to bar the person legally entitled—if the latter, his entry by mistake, cannot give him a right in this Court to call upon the trustee to convey the real estate to him, in exclusion of the person entitled. Up to 1811, in this case it is clear, that the estate of the legal tenants was not barred. When the time arrives for the conveyance of that legal estate, to whom is he to convey it? Must he not necessarily convey it to the person who is entitled to the Equity of Redemption? Would he be permitted to say, I have received the interest of my money through *A.*, and therefore I will convey to *A.*? The answer would be, we have nothing to do with the person who paid you the interest, but we are entitled to the Equity of Redemption, and therefore to us, and us only, you are bound to convey your legal estate.

Harmood v. Oglander (b), is a strong authority, as showing the feeling of the judges. The circumstances

(a) 2 Ves. 472.


(b) 6 Ves. 199. 8 Ves. 106. 192.

1817.

 CHOLMONDE-
 LEY
 v.
 CLINTON
 and Others.

of that case are also very peculiar, and as it appears to me, very material to our purpose. There, the persons who were in possession had enjoyed the property for thirty-two years, and their possession was not contrary to the actual intention of the testator, but contrary to the intention as implied by the law of this Court. Lord *Alvanley*'s decision in that case must have depended upon this principle—that, as there was reason to suppose the legal estate in *Charles Lawrence* remained unbarred, *Charles Lawrence* was, by construction of this Court, a trustee for the co-heir; and therefore Lord *Alvanley* says, “ Though thirty-two years have elapsed, “ I will suffer you to go to law to see whether *Charles Lawrence* has any right;” which went on this principle, that, if *Lawrence* had the legal right, the equitable right must follow, and he would be a trustee for the persons entitled, and not for the person who claimed under a wrong instrument, though in possession for thirty-two years. [See the Lord Chancellor's judgment.] Here then we have a clear opinion of Lord *Alvanley* followed by that of Lord *Eldon*, that, if the right was not barred at law, though *Lawrence* was not originally a trustee for the persons claiming, their right would be consequential: and it appears a strong authority in our favour.

Lord *Redesdale*, in *Hovenden v. Lord Ammesley* (a), makes this observation—“ If a trustee is in possession, “ and does not execute his trust, the possession of the “ trustee is the possession of the *Cestui que trust*; and, “ if the only circumstance is, that he does not perform “ his trust, his possession operates nothing as a bar, “ because his possession is according to his title”—and then he goes on to illustrate that. This is our case;

(a) 2 Scho. & Lef. 607.

1817.

 CHOLMONDE-
 LEY
 v.
 CLINTON
 and Others.

for our trustee does nothing adverse to our title, but only sleeps on our rights; not entering, (as he might have done,) nor claiming the estate as mortgagee in possession, but at the same time doing nothing to bar us. Therefore, it is exactly the case Lord *Redesdale* puts. He does nothing to assist our right, nor is it essential he should; for it is clear that, while his estate was unbarred, our right was consequential. It has always been held, that where the *Cestui que trust*, who was really possessed, has, after being in possession, done an adverse act, that shall not operate by relation. This is laid down in *Kean v. Deardon* (a). There is a strong case of *Willis v. Shorrell* (b), which further establishes our point, that, while the legal interest remains unbarred in the mortgagee, it is unimportant to enquire whether the equitable interest is gone, because our right is consequential to his right, and, the moment we show our legal estate remains unbarred, the consequence necessarily follows, that we are entitled, and no one else, to the Equity of Redemption.

In *Pickering v. Stamford* (c), it was held, after consideration, by Lord *Alvanley*, that Time, *per se*, goes for nothing in this Court, and a bill was accordingly maintained after a lapse of five-and-thirty years. That again is precisely our case. There the legal estate was in executors, here it is in the mortgagee. There the executors suffered persons not entitled in equity to receive the rent for thirty-five years, here the mortgagee has suffered them to receive it for more than twenty years; and we are entitled notwithstanding the wrongful payment.

In *Saunders v. Lord Annesley* (d), Lord *Redesdale* went into the question whether a man, claiming in one cha-


(a) 8 East, 248.

(b) 1 Atk. 474.

(c) 2 Ves. jun. 272. 581.

(d) 2 Scho. & Lef. 73.

racter, could claim in another. That applies strongly to the case before the Court. In fact Lord *Clinton* claimed as equitably entitled. He says to the mortgagee, I am entitled; and the mortgagee suffers him, upon that claim, without admitting it, to enter and take the rents. It is not competent to Lord *Clinton* to claim in a different character. He imposed himself (I do not use the word in an offensive sense), but he imposed himself upon the mortgagee as entitled to the rents. This afterwards proves to be not the case, and he cannot now turn round and say, It is true, I entered as claiming the equitable right, but that was wrong; and I now claim a title by twenty years' adverse possession. There is no equity in that. It is a surprise on the mortgagee; who never meant to do any thing not consistent with his character, which imposed on him a duty to convey to the party entitled to the Equity of Redemption, whenever the money should be paid off.

1817.

 CHOLMONDE-
 LEY
 v.
 CLINTON
 and Others.

If we were driven to this question of Time, which I apprehend we are not, it would be a strong argument to say, the time would not run till 1794, when they took the release from us; and then we are within the twenty years. Is it to be endured, that persons are to enter, claiming rights, which, after they have so entered, they admit they have not, and then apply to others to confirm those rights, whom they would afterwards attempt to bar by the claim of adverse possession? By applying for the confirmation, they admitted some right in the party applied to.

The Rule of this Court, "*Qui prior est tempore potior est jure*," seems to show that the question, in regard to the possession, who has the best estate, never enters the mind of this Court. If that be the rule, it shows that, when parties come here, and claim under conflict-

1817.

CHOLMONDE-
LEY
v.
CLINTON
and Others.


For the Defendant, Lord Clinton.

Sir Samuel Romilly.

I appear as counsel for Lord *Clinton*, to resist the claim which is made on the part of the Plaintiffs to those large possessions which Lord *Clinton* is now enjoying, which formerly belonged to his ancestors, and of which he and his father had been in the quiet and undisturbed possession for more than twenty-one years before the present claim was made. Upon the death of *George Earl of Orford*, the estates in question devolved upon the late Lord *Clinton* (then Mr. *Trefusis*), under the deed of 1781. Mr. *Trefusis*, although clearly entitled to the ancient barony of *Clinton*, yet, not having possessions which would enable him to maintain that title with the dignity which it requires, had not before laid claim to it; but, upon coming into possession of these estates, he set up that claim in which he succeeded (for no doubt could be entertained upon it); and afterwards, by the deed of 1792, settled the estates in such manner as to go with the title as far as the law would permit. Under that settlement the present Lord *Clinton* has been in the enjoyment of the estates from the time of his father's death to the present moment, hoping that he should be able, together with the title, to transmit the estates themselves to a late posterity.

It was while he was in the enjoyment of these expectations that, in a very unlucky moment, it came by some strange and fatal accident to the knowledge of the present Plaintiffs, that they might set up a claim to these estates. I call it an accident, for it was one of those events which it was impossible to guard against or foresee. There was not, and had not been for years, any litigation between Lord *Cholmondeley* and Mrs. *Damer*, and Lord *Clinton*; there was nothing which should set them upon enquiring into the validity of Lord *Clinton's*

title; nothing that brought any of those deeds in question. It is from some unknown and nameless cause that an investigation was set on foot; and the result of that investigation is, that the present claim has been made. It is made by two persons, both of whom cannot by possibility be entitled; if Lord *Cholmondeley* is entitled to these estates, Mrs. *Damer* is a total stranger to them; if Mrs. *Damer* is entitled to them, Lord *Cholmondeley* has no more to do with the question than a by-stander who never saw them.

1817.

 CHOLMONDE-
 LEY
 v.
 CLINTON
 and Others.

It is extremely material to draw Your Honour's attention to this circumstance; for no doubt is, or ever could be entertained, that, if Lord *Orford* had that claim to the estate which is the subject of the present suit, it passed to Mrs. *Damer*, that Lord *Cholmondeley* has nothing to do with the estate, and we have therefore a right to have the bill dismissed against him.

I do not dispute that, if such an agreement between the Plaintiffs, as is alleged in the bill to have been entered into, had been proved, Lord *Cholmondeley* would then have had a right, jointly with Mrs. *Damer*, to institute a suit; but I submit, that it is not sufficient for these parties to say, they have entered into such an agreement. To be sure, Mrs. *Damer* has a right, as against herself to admit it; but, as against us, before Lord *Cholmondeley* can call upon us, he must prove his title; for it is not competent to a person who has a claim on the property of another, to let in a third person,—one whom he might least wish to examine his title-deeds—one who might be the most obnoxious to him of any—to participate in that claim, merely by saying, I have made an agreement, by which I have assigned half the property to him, and therefore you must now litigate with this well skilled and not very well reputed attorney,

1817.

CHOLMONDE-
LEY
v.

CLINTON
and Others.


and disclose to him that which he has no right to know, but which I am entitled to, and which I will participate with him by stating that he has an interest.

It is impossible to dispute that this interest, such as they state it to be, passed by the will of Lord *Orford*, if Lord *Orford* was himself possessed of it; the words of the will being the most ample and extensive to convey all the real interest which the testator possessed. No doubt can be entertained that it conveys to Mrs. *Damer* every thing he had, and that Lord *Cholmondeley* is (with respect to his not having proved the alleged agreement) a mere officious stranger.

Considering this, then, as the case of Mrs. *Damer*, the questions are three: first, What is the effect of the deed of 1781—Whether, by the ultimate limitation in that settlement, the estate was vested in the right heirs of *George Earl of Orford*, the settlor—Or whether that ultimate limitation was a remainder in fee given to the person who should, upon the failure of issue, and non-appointment by the *Earl of Orford*, be the heir of *Samuel Rolle*? The second is, as to the deed of 1794, the confirmation, and conveyance to the uses, of the settlement of 1792? And the third question is, What is the effect of the length of time, and of the acquiescence, that have occurred in this case?

I. The first of these questions is, as I apprehend, a mere question of construction. The single point is, what is the effect of the limitation in the settlement of 1781? And one would hardly think it could be necessary, at this time of day, to refer to rules for the construction of deeds; but, rather because there has been so much law introduced into the arguments of the case, than on account of any necessity there could be to re-

mind the Court of them, I will refer to the doctrine, as laid down in *Shepherd's Touchstone* (a), and also in *Comyn's Digest*, concerning them. From these authorities, it will be found that the rule is not as is alleged on the other side, when they say that the recital can be taken into consideration only where the words to be construed are in themselves ambiguous.

1817.

**CHOLMONDE-
 LEY**
 v.
CLINTON
 and Others.

The true question, on this part of the case, has not, I believe, been correctly stated. It is not what is the effect of a limitation to a man's heirs, but who is meant by the description contained in the ultimate limitation in this deed? They are words of description, and nothing else; and, in order to see who it is that the party means to describe by that limitation, you must take into consideration his professed intention, and what is the whole effect and tendency of the deed in all the preceding limitations. It is a deed to operate by way of use; and there has been a more liberal construction put upon deeds to uses than upon any other deeds. The intention of the parties is there more particularly looked to, and the words more made to bend to the intention. This is distinctly stated in the case of *Leigh v. Brace* (b). The case of *Pybus v. Mitford* (c) not only lays down the same rule with respect to the construction of deeds to uses, but also shows that by such limitation to heirs a person may take as purchaser. (See particularly Lord *Hale's* observations in this case.) Lord *Hardwicke* also

(a) Touchst. cap. 5. "Exposition of Deeds," sect. 14. "How a deed of grant shall be construed and taken in all the parts and branches thereof."

101. 3 Salk. 337, &c. "The Report in *Carthew* is incorrect, and denied as authority in *Willes*," 181, 182. See Sugd. Gilb. on Uses. 144.

(b) Carth. 343. Ld. Raym. 101. 5 Mod. 266. 12 Mod. (c) Vent. 372. Both these cases were cited at length in the argument.

1817.

CHOLMONDE-

LEY

v.

CLINTON
and Others.

takes the same distinction as to deeds to uses, in the case of *Rigden v. Vallier* (a).

I have cited these authorities to show that there is a more liberal construction put upon deeds to uses than upon conveyances at common law. The question then is, What appears to have been the intention of the author of this settlement, as it is important to call Your Honour's attention to all the recitals contained in it? It begins with a statement describing the settlor as "only son and heir of *Robert Earl of Orford* by *Margaret* his wife, who was the daughter and only surviving child and heir of *Samuel Rolle*, who was the only son and heir at law of *Robert Rolle*, by *Arabella* his wife, who was the daughter and one of the co-heirs of *Theophilus Clinton*, Earl of *Lincoln* and Baron of *Clinton*." It then proceeds to state the will of *Samuel Rolle*, under which he had become tenant in tail; it recites the recoveries; then, that "the said *George Earl of Orford* was willing and desirous that the premises should continue in the family and blood of the said *Samuel Rolle*;" then comes the witnessing part, "that for and in consideration of the natural love and affection which the said *George Earl of Orford* hath and beareth unto his relations, the heirs of the said *Samuel Rolle*, and to the intent that the premises may remain and continue and be in the family and blood of his late mother, the said *Margaret Countess of Orford*, on the side of her father the said *Samuel Rolle*," &c. After which, immediately follow the limitations, "to the use of him the said *George Earl of Orford* during his natural life, with remainder to the use of such persons, &c. as he should appoint; and in default thereof to the use of the right heirs of the

(a) 2 Ves. 252. 3 Atk. 731.

“said *Samuel Rolle* for ever, and for no other use, in-
“tent, or purpose;” and lastly, a power of revocation
of all the uses contained in that deed.

1817.
CHOLMONDE-
LEY
v.
CLINTON
and Others.

Many doctrines have been contended for, and authorities cited, to prove what never will be disputed by me, or, I believe, by any one of us. It was unnecessary to take such pains to show that technical words must have a technical sense. I do not dispute that, if the limitation in this deed had been merely to Lord *Orford* for life, with remainder to the heirs male of his body, with remainder to the right heirs of *Samuel Rolle*, he, being the right heir of *Samuel Rolle*, would have taken an immediate fee. But the question is, What was the intention of the author of this settlement? And is it not clear that, to give such an effect to this deed, would be to disappoint that intention? His intention was to settle these estates so that they might “continue” and remain in the family and blood of his late mother, *Margaret Countess of Orford*, on the side of her “father, *Samuel Rolle*.” Why, it is perfectly clear that, if he immediately vested a remainder in himself, which would pass to the paternal heir, the direct object of this deed would be frustrated by the limitations of it. But it is not only the recital that is so clear and plain, but the limitations themselves show his intention. After an estate to himself, with remainder to the heirs of his own body, he then gives to himself a general power of appointment by deed or will, and, in default of such appointment, remainder to the heirs of *Samuel Rolle*. If this were a remainder to himself in fee, what was the use of the limitation to such persons as he should by deed or will appoint? If he had the remainder in himself, he had the power of disposing of it by deed or will. Therefore, that very limitation shows it could not be his intention to describe himself; and the question

1817.

CHOLMONDE-
LEY
v.
CLINTON
and Others.


then is, who it was that he did mean to describe by this limitation?

But they say, if the limitation were to be construed to such person as should be heir of *Samuel Rolle* at some future period, we are unable to point out what was the period intended, and therefore the deed would be void for uncertainty. But there is no room for such an argument; there can be no doubt that it is a limitation to such as should answer the description of heir at law of *Samuel Rolle* at the time of a failure of issue of *George Earl of Orford*. That was an event which might happen at his death; but the uncertainty, as to the time of its happening, is no objection to the limitation.

If the limitation had been to the use of the *then* right heir of *Samuel Rolle*, the mere insertion of that word, "*then*," would have put it out of all doubt; and the question is, whether, taking the whole of the provisions of this settlement together, the Court must not, of necessity,—I do not say, *insert* that word, which is not necessary,—but read the deed as if it were there? Will it be possible to give effect to all the parts of this deed, without considering it as a description of the person who shall, at the failure of issue of *George Earl of Orford*, be the heir of *Samuel Rolle*?

There are objections which seem to be of a very singular kind, as that you might put cases in which, under our construction of this limitation, the estate would go quite away from the heir of *Samuel Rolle*. No doubt—but, because you can find cases in which, from a coincidence of circumstances not to be foreseen, this limitation could not answer the purpose intended as effectually as it might have been made to do, it does not follow that this was not his intention.

It has been said, this is a strange deed to denote any anxious desire that the estate should be continued in the family of the *Rolles*, when the author of the settlement has reserved to himself the most absolute dominion over it. But he did not mean to restrain himself from the power of giving this estate to whom he pleased. He only intended, that it should not go *by descent*, to his own paternal heir. This object,—I would almost say, the only object, which is clear on the face of the deed,—is in direct opposition to the legal construction of it. But it has been particularly pressed on the Court, that the recitals can be taken into consideration, only if there are ambiguous words contained in the deed. Suppose the recital in this case had been, that it was his intention that, upon failure of issue of his own body, the estate should go to the person who would, at that time, answer the description of heir of *Samuel Rolle*, would it be possible to say that the operative parts of the deed, though, taken by themselves, there might be nothing ambiguous in them, would not be to be explained by the recital? Can it be contended that so plain an expression of intention in the recital is not to give an effect to those operative words, which they would not have without it? Particularly when, as I again press on Your Honour's attention, the question is, not what is the effect and operation of the limitation, but who was the person intended to be described by that ultimate limitation? I conceive that, taking into consideration the recital to be found in this deed—the declared intention of the author of the deed—the other limitations which are contained in it—the whole purpose of it from the beginning to the end; considering likewise that it is the duty of Courts to look to the intention of parties, and that deeds to uses receive a more liberal construction than other instruments; considering all these things, I submit, it is clear in this

1817.

 CHOLMONDE-
 LEY
 v.
 CLINTON
 and Others.

1817.

CHOLMONDE-
LEY
v.
CLINTON
and Others.

case, that Mr. *Trefusis* was the heir of *Samuel Rolle*, who upon the death of *George* Earl of *Orford* became entitled; and that Earl *Horace* could not, upon that event, have made any successful claim to this property.

II. The second question is as to the effect of the deed of 1794. Upon Mr. *Trefusis* becoming entitled to this estate, he made a settlement which has been already stated. A mortgage had been executed by *George* Earl of *Orford*, in 1785, and a question had arisen whether the effect of that mortgage had not been, under the powers of the deed of 1781, to revoke the uses of the settlement. That doubt alone appears to have occurred to Earl *Horace*; there is no evidence that he knew of any other objection to be made; but it is clear he knew of all the facts on which the other question has since arisen—not only he knew of all those facts, but they are all expressly stated in the deed which he executed. In the deed of 1794, *Horace* Earl of *Orford* confirms and conveys all the interest which he might by possibility have in this property, to the uses of the settlement of 1792; for it is in that way that this deed is to be construed, and not either as a mere deed of confirmation, or release. It purports to be an absolute conveyance of all the estate he possessed in the premises, by lease and release, to the uses of the settlement of 1792.

The release sets out, as the deed of 1781 had done, with a very full and particular statement of the pedigree of Lord *Clinton*. It is made “between the Right Honourable *Horatio* Earl of *Orford*, uncle and heir at law of the Right Honourable *George* late Earl of *Orford*, deceased,” of the first part, the Earl of *Coventry* and others of the second part, and “the Right Honourable *Robert George William*, Baron

“ *Clinton*, eldest son and heir at law of *Robert Cotton*
 “ *Trefusis*, who was the eldest son and heir at law of
 “ *Robert Trefusis*, who was the eldest son and heir at
 “ law of *Samuel Trefusis*, who was the eldest son and
 “ heir at law of *Francis Trefusis*, by *Bridget* his wife,
 “ who was the daughter of *Robert Rolle* by *Arabella*
 “ his wife, the daughter of *Theophilus* Earl of *Lincoln*,
 “ Baron *Clinton*, and Baron *Saye* deceased, and who
 “ was the only surviving sister to *Samuel Rolle*, late of
 “ *Heanton* aforesaid, Esquire, deceased, the only son of
 “ the said *Robert Rolle*, Esquire, by the said *Arabella*
 “ his wife; the said Lord *Clinton* being also heir at
 “ law, *ex parte maternâ*, of the said *George* Earl of
 “ *Orford*, who was the son and only child and heir at
 “ law of the Right Honourable *Margaret* Countess of
 “ *Orford*, deceased, who was the daughter and only
 “ child of the said *Samuel Rolle*, of the third part.”

So that, with great anxiety, in this deed the whole of Lord *Clinton*'s pedigree is recited. It is stated in what manner he was the heir of *Samuel Rolle*. The deed was not executed for any purposes of confirmation or conveyance to him as heir of *Samuel Rolle*. That was not the question, because the deed of 1781 had already done that. But they are facts which were particularly drawn to the attention of *Horace* Lord *Orford*, and not at all immaterial, if the question to be considered is, whether or not, if Earl *Horace* had been apprized of this objection, he would have taken any advantage of it.

It is to no purpose then that it may be alleged that Earl *Horace* executed this deed in ignorance of the facts; it is of no importance that he may have been ignorant of the legal conclusion to arise from them. All the facts are most distinctly, and with great anxiety, stated in this instrument, which, after stating the parties, proceeds to recite the settlement of 1781, in which settle-

1817.
 CHOLMONDE-
 LEY
 v.
 CLINTON
 and Others.


1817.

CHOLMONDE-
LEY
v.
CLINTON
and Others.

ment had been recited, (and are again recited in this deed,) the Will of *Samuel Rolle* — the anxiety of *George Earl of Orford* to continue the estates in the family and blood of *Rolle* — the mortgage — the death of *Lord Orford* — and the settlement of 1792. It then goes on to state that that settlement was made “between the said *Lord Clinton* (who was the heir at law of the said *Samuel Rolle*) by his then name of *Robert George William Trefusis*, and such description as herein before contained, of the first part.” It goes on to recite the whole of that settlement, and all the uses that are contained in it. And then it states, “And whereas doubts have arisen,” &c. (See the statement of the deed.) Now, it is contended that the last words—“to, for, and upon such and so many of the uses,” &c. of the deed of 1792, “as are now existing undetermined or capable of taking effect, in the same manner as if the said indenture of the 6th day of *June*, 1785, had not been made, and to and for no other use, intent, or purpose whatsoever,”—is to confirm these settlements in a limited manner only,—to confirm them as far as the deed of 1785 could affect them,—but not to confirm them in any other respect.

Now, to consider, in the first place, whether this was the intention of the party, and next, whether such an intention could be carried into execution by such a conveyance as this. In the first place, that it was not the intention of *Lord Orford*, is clear. His intention was, and it is so expressed by this deed, to confirm to all intents and purposes the deed of 1792, and to confirm it as completely as if no such deed as that of 1785 had ever existed. The reason why nothing more was recited, is because there was nothing to occasion any obstacle to the validity of the deed of 1792, but that possible revocation of 1785. But, though that was the

only difficulty in the way of it, yet it is a confirmation to all intents and purposes. A confirmation, stating at the same time that the reason of making it is, because such a deed as that of 1785 existed. He says, I do it, and declare I do it as effectually, as if that deed of 1785, which occasions the difficulty, had never existed: but still it is a conveyance. It is not a release of an interest, but a conveyance of the estate, to the persons on whom it had been previously intended to be settled by the deed of 1792, and a conveyance to them, to the uses of the deed of 1792. It is true, if a man has two rights, he may release one of them; but a man cannot convey an estate, as to one title which he has not, and not as to another which he has. If a man disposes by deed of an estate as heir at law, and it afterwards turns out that there was a will, by which the estate was devised to him, would his deed have no operation because he recited that he was heir at law, and conceived himself to have the estate as heir at law? He conveys his interest in the land. A man may convey the right, but it cannot be as a conditional conveyance, and yet it must be said that this was a conveyance to operate, provided the deed of 1785 was a revocation, but, if it was not, then not to operate at all. That was not the intention of the author of this deed. It was not that he should convey, only provided that deed of 1785 made it necessary; but it is a conveyance, whether the deed of 1785 made it necessary or not. It is impossible to get rid of the legal effect and operation of this deed; it is a conveyance. The question then would be whether Lord *Orford*, or any person representing him, could, by an application to a Court of Equity, have this deed reformed to what might be alleged to be his intention; whether, on an allegation that this deed was to remove the doubt about the revocation, and no other doubt, he could have that deed cut down to what he would state

1817.

 CHOLMONDE-
 LEY
 v.
 CLINTON
 and Others.

1817.


CHOLMONDE-
LEY
v.
CLINTON
and Others.

to be the real intention of the author when he executed it. Upon the supposition that this was the question meant to be argued, I did not object to the cases laid before counsel, and the opinions given upon them, being produced in evidence. They could not be received to put any construction on the deed; but, if they come into this Court to have the deed reformed according to the intention of the party, then they have a right to give them in evidence to shew what the party understood and intended at the time of the deed being executed.

It is not a little strange, I think, with respect to an act, considered, as this always has been in the family, as an honourable and liberal act, well becoming the nobleman who was the author of it, that his representatives in this Court should now so degrade that nobleman as to say that when he made this show of not availing himself of the objection, he meant it only because he was satisfied that he could not avail himself of it; that he had no claim to the estate; that the deed of 1785 was no revocation, and that it was for that reason only he consented to execute this instrument.

Notwithstanding the opinions which had been taken, I cannot conceive that this is the true character to be given to this act of Lord *Orford*. But it is not of great importance on the present occasion; it signifies little for the decision of this question, what Lord *Orford* would, or would not, have been disposed to do under other circumstances. If it was competent for him to have insisted on the claim now made; if he could have contended that the deed of 1781 still left the remainder in fee in *George Earl of Orford*, and that *that* remainder descended to him notwithstanding the deed of 1792; undoubtedly the present Plaintiffs have

(at least upon this branch of the argument) an equal right to do the same; they have a right to say, this is the bill of Lord *Orford*. But it does require some authority to be produced to Your Honour, that this Court will reform a deed executed, even though a voluntary deed,—that the Court will cut it down, and give it a different effect and operation,—when there has been no fraud or misrepresentation practised,—when the party was aware of all the facts of the case, and only did not know what were all the legal consequences of those facts,—did not know that he might insist against the clear declared intention of his ancestors,—that he might insist he was entitled to defeat, what he could have no doubt, (as no person could have any doubt,) was the intention of *George Earl of Orford*. Can an instance be produced of this Court having so reformed an instrument according to the intention of the parties who executed it, proceeding on no misrepresentation, not only no concealment, but no want of knowledge of all the facts, no fraud, no contrivance, no ignorance of the facts; but upon a mere statement, that the party was not aware of the legal effect of the facts which he was in possession of?—a matter incapable in itself of proof—for, even if Lord *Orford* had filed such a bill, he could not have proved such a statement; and, if it were proved, still, I say, there never was an instance where, under such circumstances, the Court has reformed a deed and prevented its having full operation according to its natural effect and import.

1817.

 CHOLMONDE-
 LEY
 v.
 CLINTON
 and Others.

III. Supposing both these points should be against us, the next question is, whether the Plaintiff can be relieved after the length of time which has elapsed; and, in the first place, I submit that the length of time is a complete legal bar in a Court of Equity. Suits in Equity are not barred by any statute of limitations, but they

1817.

CHOLMONDE-
LEY
v.
CLINTON
and Others.

proceed by analogy, and take the same rule as Courts of Law. Your Honour, in *Stackhouse v. Barnston* (a), said, "Though the statute of limitations does not apply to any equitable demand, yet equity adopts it, or, at least, takes the same limitation, in cases that are analogous to those in which it applies at law." And it may be stated generally, that all equitable demands will be barred by the same length of time by which, if it were a legal question in an action by which the party sought to recover, it would be barred. In every case, therefore, in which landed property could be recovered only by ejectment, twenty years have been considered in this Court as a bar. It has been so considered in cases of copyhold estates. Courts of Equity will not supply the want of a surrender in favour of a wife, or children, or of creditors, after twenty years. *Cook v. Arnham* (b), where it was so stated by Lord Talbot, and he gave relief, because fourteen years only had elapsed. And in *Davy v. Beadsham* (c), the Court refused to interfere after twenty years in the case of a surrender of a copyhold estate.

In *Winchcombe v. Hall* (d), the Court refused, after twenty years, to relieve against a deed which had been obtained by advantage taken of the father of the Plaintiff by whom the deed was executed. In *Smith v. Clay* (e), which was a question whether a bill of review could be brought after twenty years, Lord Camden refers to the question, and speaks of the twenty years as a period after which the Court will not give relief, where no remedy could be had at law. But it is said that in this case a remedy might be had after twenty years, that a

(a) 10 Ves. 453.

(c) 1 Cha. Ca. 39.

(b) 3 P. W. 283. Ca. t.

(d) 1 Cha. Rep. 10.

Talb. 35.

(e) 6 Bro. P. C. 395.

writ of right might be brought by Lord *Cholmondeley* claiming under *Mrs. Damer*.


1817.

CHOLMONDE-
LEY
v.
CLINTON
and Others.

Now *Mrs. Damer*, the devisee, could unquestionably maintain no action but an action of ejectment, and it is *Mrs. Damer's* case, and not Lord *Cholmondeley's*, which is before the Court.

Supposing Lord *Cholmondeley* to have made out this demand, as deriving under *Mrs. Damer*,—supposing him to have proved the agreement,—still it is only by *Mrs. Damer's* title he could recover the estate; and that could only be by ejectment, for no real action would lie.

But it is said this is the case of a mortgage, and a mortgage is under very different circumstances from other property, the mortgagee being in possession as a trustee for the mortgagor; and the question, they say, is whether the estate has been treated as a mortgaged estate, not with respect to the person who claims the Equity of Redemption, but with respect to any third person; and a case was cited of *Hansard v. Hardy* (a). I do not dispute that case; but what application has it to the present? That was a case, in which, as between mortgagee and mortgagor, the twenty years was insisted upon, and it was said, the twenty years cannot avail you, because in order to make good your title under the twenty years, it must be shewn you were considered the absolute owner of the estate. Now you have admitted that you have only the mortgaged estate and therefore it was impossible to avail yourself of a twenty years' possession. This is not a bill filed for redemption; if it were, why is Lord *Clinton* made a


1817.

 CHOLMONDE-
 LEY
 v.
 CLINTON
 and Others.

party? But we have held twenty years while there has been running an adverse possession of both mortgagor and mortgagee against the person who sets up a claim to reform a deed by which he has conveyed away the whole Equity of Redemption. Is it possible for a person in such a situation to say, I am now to be considered as a mortgagor filing this bill for the redemption of an estate, about which there has been no dispute? There is no question whether this was a mortgaged estate or not; the question is, whether, between two persons claiming an equity, there has been an adverse possession of twenty years against the person seeking to recover. On the ground now taken in argument, there never could be, in the case of an equitable demand, any bar by the statute of limitations; it would set aside all the decisions on the subject. There is an individual who has had the legal estate; and, because we have both considered him as a person whom we did not mean to disturb, there has been no adverse possession on his part, and consequently there cannot be a bar from length of time. Such is the consequence to which this extraordinary doctrine would lead.

IV. If, however, there has not been a length of time to bar this demand, the next question is, whether, after an acquiescence of this kind, after suffering Mr. *Trefusis*, in the first instance, and Lord *Clinton* afterwards, to deal with the estate as it has been suffered to be dealt with, and other persons to lend money on the security of their possession, the Court will give any relief. There are many cases in which, after a much shorter period than twenty years, the Court, upon the ground of mere acquiescence, will refuse to give relief. *Swanton v. Raven (a)*, was a case in its circumstances at least

(a) 3 Atk. 105.

as strong to call for the interposition of a Court of Equity as the present. (Sir *Samuel Romilly* then noticed the deposition of *Lucas* in the cause of *Walpole v. Earl of Orford*, and Lord *Cholmondeley*, for the purpose of affecting Earl *Horace* with knowledge of the facts stated in that deposition.)

1817.

 CHOLMONDE-
 LEY
 v.
 CLINTON
 and Others.

I submit, that after this circumstance, with all the length of time that has elapsed, with all this knowledge of the facts of their case, the Court will not permit the Plaintiffs now to disturb those transactions, and say they will have an investigation, as to the effect of the limitations, notwithstanding the long enjoyment that has taken place. If the Court should think they are not barred by their acquiescence, that the statute is not a bar to their demand, and that the question is still open to them, then I say the deed of 1794 has (if there could be any dispute) confirmed the transaction, and the Court will give no relief against that deed. If the Court should differ from me on that point also, still I contend that, according to the construction of the deed of 1781, considering the rules by which deeds to uses are to be governed, it is clear, the intention of the author of that deed was to give the estate to the person who, at the time of his failure of issue, should answer the description of heir of *Samuel Rolle*, which was Mr. *Trefusis*, the father of the Defendant.

[After Sir *S. Romilly* had concluded his argument, the deposition of *Lucas*, referred to above, was offered to be read as evidence for the Defendant Lord *Clinton*. It was objected that, Mrs. *Damer* not having been a party to the suit in which that deposition was taken, it was *res inter alios acta*, as to her, who was, by the Defendant's own insisting, the only material Plaintiff in this cause. But to this it was answered that, *Horace* Lord

1817.

CHOLMONDE-
LEY
v.
CLINTON
and Others.


Orford having been a party to that suit, it might have been evidence as against him, and consequently was so as against Mrs. *Damer*, claiming as his representative. Another objection was then taken, that it could not have been evidence, as it related to a fact not in issue either in the former cause or in the present. And the answer to that was, that it was not adduced to prove the fact referred to by it, but merely to establish the fact that such a deposition was taken, whether true or false, sufficient to charge Lord *Orford* with full information. And, for that purpose, it was at least as much entitled to be produced as the case and opinions of counsel brought forward by the Plaintiffs, which neither were in issue in the cause, and were introduced into the bill only by way of amendment, requiring no answer.

The *Master* of the *Rolls* was inclined to think that, for the purpose for which it was offered, this deposition was admissible evidence; and, the objections being afterwards withdrawn, it was read accordingly.]

Bell.

First, what is the meaning which, if not bound down to a strict legal construction of the term "right heirs," any common person would annex to the deed of 1781; and who, would he say, were the persons intended by the description, "the right heirs of *Samuel Rolle*?" The deed begins by stating the parties; and, in so doing, it traces up the maternal line of *George Earl of Orford* to *Theophilus Earl of Lincoln* and *Baron Clinton*. It also describes *Margaret*, the wife of *Robert Earl of Orford*, as the daughter and only surviving child of *Samuel Rolle*, whose heir at law he, *George Earl of Orford*, consequently must have known himself to be. It then states the Settlement and Will of *Samuel Rolle*, with all the limitations preceding those in favour of

John Rolle and *Samuel* his brother; and there it stops. It makes no mention whatsoever of those last limitations which (it has been contended) were the limitations in the view of this nobleman when he was making this settlement of his estate. It is certainly very extraordinary, if that was his intent, that he should be at so much pains to deduce his maternal line of descent from the Earl of *Lincoln* and Lord *Clinton*, and should not take any notice whatsoever of those limitations to the *Rolles*. One would imagine, if he had intended to have limited it to the *Rolles*, it would have been exactly the reverse; that he would have stopped when he had carried his descent up to *Samuel Rolle*, and would have introduced the limitations to those gentlemen, and pointed out in what way they were related to him; but that he does not do. He then goes on and states the death of *Samuel Rolle*, and deduces his own title; from which it equally appears that he was at that time the right heir of *Samuel Rolle*. It is therefore just as if he had described himself in the beginning of this deed as *George Earl of Orford*, the right heir of *Samuel Rolle*.

1817.

 CHOLMONDE-
 LEY
 v.
 CLINTON
 and Others.

Then follows the recital so much commented upon.

Now nothing could surprise any person more than, after having met with this recital in a deed, to find the effect of it that which the gentlemen on the other side contend for. "Whereas I am myself the right heir of "*Samuel Rolle*, I am desirous to settle this estate upon "the right heirs of *Samuel Rolle*. I therefore give it to "myself for life. I then give it to the heirs of my "body. I then give myself a power of appointment, "and I then give it to myself again." So that the way by which he intended to settle this estate, so as to go in

1817.

CHOLMONDE-
LEY
v.
CLINTON
and Others.

the maternal line of descent, was to give himself at once a fee-simple, in case he had no issue, and in case he did not exercise any power of appointment. If that was his intent,—if he meant to declare the ultimate limitation to himself in fee,—why did he introduce these two powers of appointment? A conveyance by lease and release is as easily executed as a deed of appointment. But what is the natural construction that any person would put upon these limitations? “I have settled this estate to myself for life, and after my death to the heirs of my body. I choose to reserve to myself a power of appointment in case I should think fit in any way to alter this; but, if I do not think fit to alter it, I mean that the estate should go to the right heirs of *Samuel Rolle*, —not to myself, but to the person who, at that period, shall be the right heir of *Samuel Rolle*.”

As to the period intended to be designated, there can be no doubt that it is when the line of heirs of his body, to whom he had before limited the estate, should be extinct; for he did not mean to give it to himself; he did not mean to give it to the heirs of his body, as representing *Samuel Rolle*; but, in case of the failure of those two lines, then, and in that case, did he intend that it should go in the line of *Samuel Rolle*. And the only question, as I conceive, is, whether we can give effect to this very plain and manifest intent? How is it to be effectuated otherwise than by construing “the right heirs of *Samuel Rolle*,” as words of description, and by referring them to the period to which I have before alluded? That it is not a word of limitation is in fact admitted; for what they contend is this, that it is a description of who is to take *in presenti*; and that therefore it became incumbent upon us to enquire who were the right heirs of *Samuel Rolle*, at the then present time. Then they say, they find, that right heir was *Earl George*; and the

consequence of that is, that it is his own reversion.— They very properly argued it so, for that is the only way in which they could contend that he takes back his own estate; that is, that, having declared his intention was to vary the line of descent, and to transfer it into his mother's line, he takes it back to himself, and continues it in his father's.

1817.
CHOLMONDE-
LEY
v.
CLINTON
and Others.

If a man give an estate to the "heirs" of *J. S.*, *J. S.* being a stranger, it is a word of description; and if *Samuel Rolle* had been an entire stranger, and had been living, I conceive this would have been a contingent remainder; if dead, a limitation by way of purchase; but, in both cases, it would operate as a description, and that will be an answer to the greater part of the arguments that have been used. The only question then is this,—as a word of description, to what period it shall be held to apply; whether we are bound to apply it to the period when it was made, whereby the whole intent of the deed would be defeated; or, whether we are not bound to put a different form of construction upon it.

Besides, if we look at the express words of the limitations, they are to take effect, "from and after the decease" of *George Earl of Orford*, the estates are to go "from and after his decease" to his issue, if he had any; but if he had no issue, then still "from and after his decease," to the right heirs of *Samuel Rolle*.

But, they say, there are certain rules of law always to be adopted in the construction of the word heirs, which completely control us. The first proposition is, that technical words are to have a technical meaning; and for that they refer to the very high authority of Mr. Justice *Buller*, which amounts to this, that where technical words alone are used, they must receive their

1817.


CHOLMONDE-
LEY
v.
CLINTON
and Others.

technical sense; but what he says is no authority for asserting that, when technical words are used, accompanied with other words which manifestly indicate a different intention, they are to be understood in the technical sense only; and, in the case at least of a will, he expressly says the contrary.

The next class of cases referred to, is that in which a man makes a conveyance, and introduces into it a limitation "to his own right heirs." *Fenwick v. Mitforth*, the Earl of *Bedford's* case, &c. Those cases it is not my intention at all to quarrel with; but the true point here is, whether there are not sufficient words in this deed to vary the technical construction, by raising the question, whether the author could have meant his own right heirs when he made this deed? If he did not mean his own right heirs, (which no person can believe,) there is an end of their case.

The next class of cases is that founded upon the rule in *Shelly's* case, that, if an estate is limited to a man for life, with remainder (either immediately, or after intermediate remainders) to his own right heirs, or the heirs of his body, he takes an absolute estate either in fee or in fee tail, immediately in the one case, and by way of remainder in the other. But this class of cases is not in the least applicable to the present. Here the settlor does not speak of his own right heirs; he says, "to the right heirs of *Samuel Rolle* for ever." Now, if we even are to consider him as speaking of the time when this deed is made, it is not a limitation to his right heirs but to himself, for he himself answers the description of "right heir of *Samuel Rolle*." This has nothing to do with *Shelly's* case, where technical words are used without any thing to control them. Before I leave that part of the case, however, I will refer to one authority which

shows that the intent of the party may control even the favourite rule in *Shelly's* case,—the opinion of one of the warmest advocates for that rule, the late Mr. *Fearne*, who says, that cases may arise where the estate of freehold limited to the ancestor may be so limited in trust for another; as a limitation to the use of *A.*, during the life of *B.*, in trust for *B.*, or in trust to pay the rents and profits to *B.*, with remainder to the use of the heirs of the body of *A.* And in such cases, he says, he does not think the two estates would unite; that the apparent intent is sufficient to control the general rule.

1817.

 CHOLMONDE-
 LEY.
 v.
 CLINTON
 and Others.

The next class referred to, is of cases in which the words are used as words of limitation, not of purchase.

The first is that in *Coke Littleton*, 20., where the only question was, what species of heirs of the grandfather were to take? "And Lord *Coke* says, "*it is said by some* that the statute *de donis* is so strong that it will "give an estate tail to the grandfather." But that has nothing to do with the case where the word "heirs" is used as a word of description.

So in the case, section 32. the question was, what sort of an entail was created? They say, the statute *de donis* is so powerful, that it will enable us to give a limitation to those heirs—they shall, therefore, take not by purchase but by limitation, in a particular kind of descent. Now, what has that to do with this case, where the whole question is, who is meant by "the right heirs of *Samuel Rolle*," and at what time they take?

The case in 2 Roll. Ab. 417. pl. 6., which has been cited as a strong case, is marked with a "*dubitatur*." But if it were not, it is still reducible to the very same class of cases.

1817.

CHOLMONDE-
LEY
v.
CLINTON
and Others.


The next point made is, that the Court always labours to give an immediate vested interest; and, with a view to that, the case of *Doe v. Maxey* (a), and the opinion of Mr. Justice Bayley in that case, are referred to; but, instead of supporting that proposition, the opinion of Mr. Justice Bayley appears to me to corroborate our view of the case; for what he says is, "that it is a settled rule not to read limitations in a will as being a contingent remainder, unless such appears to have been clearly the intention of the testator; but if it will admit of being considered as a vested remainder, the Court will always read it as such, because a contingent remainder is liable to be defeated, and the intention of the testator thereby frustrated." Now that is exactly the question between us here,—whether it does not here appear, clearly, that it was the intention of the testator, that this should not be a vested remainder, but contingent, that being the only way to give effect to his meaning. In that case, it was held, that the one estate belonged to the right heirs of the testator at the time of his death. But why? because, they said, it was evident the intention was that it should go in the same way as the other estate, with regard to which there was nothing at all to show that, by his own right heirs, the testator meant his own right heirs at any other except at the time of his death; and that, as to that, it was a mere intestacy. That case, therefore, has no reference whatever to the present.

Phillips v. Deakin (b) was a case sent from this Court. The Judges therefore did not give their opinion, but only made their certificate; and we do not know the grounds upon which they proceeded, except by the arguments of counsel; but those arguments contain the

(a) 12 East, 589.

(b) 1 M. & S. 744.


same law, and correspond with the decision of Mr. Justice Bayley; and the Court was of opinion, that the limitation did not take effect till failure of issue of the daughter, therefore this rule is certainly not an intractable rule, but a question of intention; and all it establishes is, that, where the intention is not apparent, the Court will lean to make remainders vested rather than contingent.

1817.

 CHOLMONDE-
 LEY
 v.
 CLINTON
 and Others.

The next point contended for was, that the law gives a present operation to the word "heirs;" and to support that doctrine, the cases of *Lamb v. Archer*, (or rather the *dictum* of a judge in that case,) and *Goodright v. Cornish*, are referred to. But *Fearne* (a) shows that these cases were decided on different grounds. He says, he has not found any case determined upon this distinction between *verba de presenti*, and *verba de futuro*; for that, in the cases he had cited, the judgments did not rest on that point; and he then goes on to give his explanation of the case of *Goodright v. Cornish*, which he concludes by saying, "However, since *B.* died without issue, it became void in event, whatever it was in its creation, therefore I apprehend the judgment did not decide that point."

Then it seems to come ultimately to this, that wherever there are circumstances from which the testator's intention can be collected, the rule cannot prevail, but the Court will collect the intention from the whole of the will or instrument which is before them. *Goodright v. Cornish* was the case of a will. In *Lamb v. Archer*, there was nothing to show to what period "the right heirs of *A.*" referred; besides which, it appears to have been, not a feoffment to uses, but an im-

(a) Ex. Dev. Powell's Ed. 504, 505. Butl. Edit. 532, 533.

1817.

 CHOLMONDE-
 LEY
 v.
 CLINTON
 and Others.

mediate and direct feoffment to some person or other by that description.

As to the cases mentioned as having been decided on the principle of intention, the first is *Doe v. Lawson* (a), where Lord *Ellenborough* was of opinion that the words, referring expressly to the statute of distributions, fixed the period at the death of the testator.

But, supposing the fact had been, that in this very will the testator had recited that *Joseph Wilson* was a person who would take according to the statute of distributions, but that he meant it to go to his other relations, does it follow that Lord *Ellenborough* would then have been of the same opinion?

In *Holloway v. Holloway* (b), the only point which the *Master of the Rolls* decided was, that the words must be taken in their natural sense, till it be found out by the context that they were intended in some other way. The only question is, whether there is not sufficient, from the context, to show the intent. *Jobson's case* (c) was another of the same kind, and nobody could doubt the propriety of that decision. In *Perriman v. Pearce* (d), the only question which could be asked was, What is there, upon this particular case, that obliges the Court to defer it to any future time? That case is also differently reported in *Viner* (e). *Doe v. Colyear* (f) appears to be nothing but one of the common cases to which the rule in *Shelly's case* must apply. *Peters v. Masham* (or *Morehead*) (g), is thus stated by Mr. *Sugden*. (See *Sugden on Powers*, 2d edit. p. 549.) The question is there represented to have been simply, whether the son had

(a) 3 East, 278.

(b) 5 Ves. 399.

(c) Cro. Eliz. 576.


(d) Palm. 204.

(e) 8 Vin. Ab. 326.

(f) 11 East, 528.

(g) Fitzg. 156.

sufficiently specified the land, and the Judges decided in favour of the validity of the appointment.

1817.

 CHOLMONDE-
 LEY
 v.
 CLINTON
 and Others.

We must next consider, what are the authorities which show that the Court can, in such a case as this, construe "heirs" as a word of description, and that we are not bound to take it in a strict technical sense. It has been properly admitted that there are such cases to be found, and that of *Burchett v. Durdant* has been mentioned, from which it is clear that a limitation to the heirs male or female of the body of *B.* might receive a construction as words of description. So, in *Darbison v. Beaumont (a)*, the House of Lords held, there was sufficient ground to infer that the words were not to be construed in the common sense of "heirs;" but that, notwithstanding there was no person then answering the description of heirs, they must be considered in the popular sense of heirs apparent. See also the words of Lord Chief Justice *De Grey*, in *Goodright v. White (b)*, "that latterly the Court was less strict in construing "these cases than it had been two hundred years ago;" which, if those cases that have been cited from the oldest authorities did apply, would go very far to do away the effect of them. So, *Peacock v. Spooner (c)*, *Dafforn v. Goodman (d)*, *Hodgson v. Bussey (e)*.

There is another class of cases, where the description of heir has been used, but the party has not completely answered that description. *Brown v. Barkham (f)*, was of this nature, which was a case upon

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| (a) 1 Bro. P. C. 489. 1 P.
W. 229. | (f) Pre. Cha. 443. 461.
2 Vern. 729. Gilb. 116. 130. |
| (b) 2 Black. 1010. | [See Fearn, C. R. 326. 1st
ed. Butl. Edit. 213.] |
| (c) 2 Vern. 43. 195. | |
| (d) 2 Vern. 362. | |
| (e) 2 Atk. 89. 92. Bar-
nard, 195. | |

1817.

CHOLMONDE-
LEY
v.
CLINTON
and Others.

a devise, and where the person who was decreed to take under the description of "heir male of the body of the "testator's grandfather," did not answer the description of heir general. There is an exceedingly learned and able argument of Mr. *Hargrave's*, (in his notes upon *Coke Littleton* (a),) to show that Lord *Cowper* was mistaken in that case; but, whatever respect is due to the opinion of that gentleman, Lord *Cowper's* decree was affirmed by Lord *Hardwicke* afterwards; and has since received the sanction of every Court in *Westminster Hall*; for the same doctrine has been held in the cases of *Wills v. Palmer* (b), in *Wall v. Blake* (c); *Burtenshaw v. Weston* (d), and *Goodlittle v. Pugh* (e); all of them cases which establish the same proposition, that, though the parties do not answer exactly the description of heir, yet the Court may construe the word, as every man of sense would do, upon that which appears to be the intention of the maker of the deed. The case of *Wills v. Palmer*, particularly, was the case of a deed owing its effect to the statute of uses. See also *Seymour v. Yeates* (f). But the strongest authority upon that subject is the opinion of Lord Chief Justice *Hale*, in the case of *Pybus v. Mitford*, which has been already referred to, and which was also the case of a deed. And the Courts have held very justly (as I conceive), in cases of deeds, owing their operation to the statute of uses, that when we are considering what is the effect of words, not of limitation perhaps, but of description, there the Court will look into the whole deed to see what is the true intent of it. So in *Rigden v. Vallier* (g), Lord *Hard-*

(a) 24. b. n. 3.

(d) Butler's Fearn, C. R.

(b) 5 Burr. 2614. 2 Black. App. No. 1.

687.


(e) Ibid. No. 2.

(c) 1 Stra. 41.

(f) Nelson, Ch. Rep.

(g) 3 Atk. 734.

wicke says, "Though we may be bound by strict rules of law, when we look at words of limitation, yet we must, for other purposes, look to the intent of parties."

1817.

 CHOLMONDE-
 LEY
 v.
 CLINTON
 and Others.

The doctrine upon that subject is also very ably laid down in the argument of Mr. Justice *Gould*, in *Fisher v. Wigg(a)*. The single question here is, whether we may not apply the rule to the description of the person intended to take; for here the words are not words of limitation, but merely of description. And I humbly conceive that, if this case was now before Your Honour on a bill filed, as to that part of the case only, Your Honour would be of opinion that there was sufficient in the deed of 1781 to construe the words, "the right " heirs of *Samuel Rolle*," to mean such as should be his right heirs at the time of the failure of the prior estates.

I ought also to observe that this is in the nature of a testamentary deed, the author having reserved to himself the most ample powers of revocation. It is perfectly clear, that he means to limit his estate for particular purposes, wishing at the same time to preserve in his own power the complete dominion over it.

II. We then come to the deed of 1794, which has been called a Deed of Confirmation, as if it was nothing but a mere deed confirming the estate of Lord *Clinton* against a particular claim; but, instead of that, it is an actual conveyance made by a person who had before him every means of forming a proper judgment upon the case. The circumstance of Lord *Clinton* being expressly pointed out in this deed as "heir at law," *ex parte maternâ*, of George Earl of *Orford*, and also Baron *Clinton*, &c. is

(a) 1 P. W. 14.

1817.

CHOLMONDE-
LEY
v.
CLINTON
and Others.


material, when we consider that he derives his title through Earl *George*, and that Earl *George* might himself have claimed the title of Baron *Clinton*, in case he had thought proper. His intent is evident from this, that he meant the *Walpole* estate to go to the descendants of the *Walpole* ancestors, together with the title of *Orford*, but that the *Clinton* estate should go to the *Clinton* family, which must be deprived of it unless this construction succeeds.

The deed proceeds to deduce by recitals the pedigree of Earl *George*, in such a way as shows that Earl *Horace* must have been perfectly well acquainted that Earl *George* was the heir at law of *Samuel Rolle*.

Then, what were those uses of the deed of 1792 to which the estate is conveyed by this deed of 1794? Some of them are to be immediately put *in esse*; as, for instance, the raising the sum of £34,000. Therefore what they contend is this, that though Lord *Orford* having the whole of the facts of the case before him, thought proper not merely to make a deed of confirmation, limiting it to that particular objection (which he might have done), but to make an absolute conveyance to the uses of this settlement, yet that his intent was merely to remove one doubt; and that if he had known there were two doubts, he would not have confirmed it. Now this must be considered exactly in the same way as a common conveyance, owing its effect to the statute of uses; and, being a general deed of conveyance, it must be considered as deeds of that description are considered;—the fact, that it is an equitable estate, will not induce this Court to put a different construction upon it.

But then they say, that it must be viewed as being made under a mistake, and that Lord *Orford* must be

considered as a person ignorant of his rights. But it is clear, that the deed laid before him every fact which could have enabled him to form a correct judgment of his rights; and can it be said, because he has applied himself only to the removal of a particular doubt, that he would not have removed another if it had been set before him?

1817.

 CHOLMONDE-
 LEY
 v
 CLINTON
 and Others.

But do they prove that Lord *Orford* laboured under a mistake? They prove, certainly, that he was acquainted with one doubt; but they do not negative the fact of his being acquainted with another; and the Court will not presume that he was not acquainted with it; but, suppose it would, still the Court must ask itself this question: If *Horace* Earl of *Orford* had been acquainted with this second doubt, would he have refused to execute this deed? I conceive the Court cannot come to any conclusion of that kind; and I think there are cases showing very strongly what is the opinion of the Court under similar circumstances.

In *Smith v. Maitland* (a), the question was, whether there was sufficient to be found upon the will to satisfy the Court that, if the testatrix had known of the power, she would have done otherwise? The Court say, we cannot conjecture what she would have done; so I say, here, we cannot take it for granted that Earl *Horace* did not know of the second objection. Your Honour is asked to presume that, if he had known of this objection, he would not have confirmed it as he did the first, because he took the opinion of two counsel, who told him that the first was not a valid objection. But his reason for confirming it is, not that he took the opinion of counsel, but that, whatever doubts there might

(a) 1 Ves. jun. 362.

1817.

CHOLMONDE-
LEY
v.
CLINTON
and Others.

be, he wished to give effect to the intention of his ancestor. There is another case upon a deed, *Doran v. Ross*(a), where, though the Court had very little doubt that there had been a mistake, yet, having nothing to correct it by, they refused to do it. So *Burt v. Barlow*(b).

Mr. Sugden has quoted a great number of cases upon this subject to establish a proposition, which I do not mean to controvert; that, where a person has executed a deed under clear and apparent mistake, the Court will correct it. Such are *Lansdown v. Lansdown*(c), and *Bingham v. Bingham*(d). *Pusey v. Desbouverie*(e), and *Cocking v. Pratt*(f), were cases of gross fraud practised upon the parties.

III. Next as to the length of time. The Plaintiffs upon the record are Lord *Cholmondeley* and Mrs. *Damer*, but it is expressly stated that Lord *Cholmondeley* has no interest except by some sort of arrangement with Mrs. *Damer*. Now it is perfectly clear that a devisee cannot bring a writ of right: the only remedy Mrs. *Damer* could have, would be by ejectment; and if that is not brought in twenty years, there is completely an end of it.

Then will a Court of Equity interfere? The opinion of Your Honour in *Beckford v. Wade*(g), is decisive on that subject—and see *Bonny v. Ridgard*(h). This is not a case of fraud—it is the case of a person who has been in adverse possession, he and his ancestors, upwards

(a) 1 Ves. jun. 57.

(b) 3 Bro. C. C. 451.

(c) Mos. 364.

(d) 1 Ves. 126.


(e) 3 P. W. 321.

(f) 1 Ves. 400.

(g) 17 Ves. 87.

(h) 4 Bro. 138. 1 Cox. 145.

of twenty years. *Lord Grenville v. Blyth* (a), was not a case of adverse possession. It was there held that there could not be an equitable disseisin; but no person thought of arguing that an adverse possession of twenty years is not to be regarded in equity in the same manner as it is at law. In *Bond v. Hopkins* (b), Lord *Redesdale*, after first observing that the statute of limitations does not expressly apply to proceedings in equity, but that proceedings in equity have been always considered as affected by it, says what, I conceive, amounts to a direct authority that a Court of Equity, in analogy to Courts of Law, will apply the statute of limitations to cases of adverse possession.

1817.

 CHOLMONDE-
 LEY
 v.
 CLINTON
 and Others.

But then it is said, that this is not a case of adverse possession, for that here was a mortgage, in consequence of which we were only tenants at will to the mortgagee, and the other party was always entitled to redeem. Now, supposing this had been a mere mortgage term, would a Court of Equity have done more than remove the term out of the way? Would it have gone on to declare that the possession shall not be a bar? In order to support this doctrine, they must maintain that, in all cases of terms for years, length of time can be no bar, and thus the statute will be rendered perfectly nugatory. But the fallacy of the reasoning is obvious. When a party has taken possession of the estate, and paid the interest to the mortgagee, he has made the estate to all intents and purposes his own both at law and in equity, unless the other party comes forward within the twenty years appointed by the statute of limitations, to claim his rights. Why does the Court appoint any rule of limitation at all? That a

(a) 16 Ves. 224.

(b) 1 Scho. & Lef. 428.

1817.


CHOLMONDE-
LEY
v.
CLINTON
and Others.

man may not be allowed to take advantage of his own *laches*. Why does a Court of Equity say, we will adopt the statute of limitations as our rule? Because no other rule can be found to answer the principle of analogy. The rule of limitation must always be a rule of positive direction. The Legislature, in case they had thought proper, might have made the rule thirty or fifty years, but they have made it twenty years; and why is a Court of Equity to judge differently from the Legislature, and to adopt any other rule? Then it comes to this; whether, in any case where there is a mortgage existing upon the estate, the statute of limitations, or the analogy which the Court of Equity borrows from the Courts of Law, must not be applied? The mortgagor has only an equitable interest, which the mortgagee has a right to demand from him; therefore, they say, the tenant in possession of the estate is to be considered as tenant at will to the mortgagee. Is there such a doctrine in our books? Is there any case to be found, in which, when a Court of Equity has removed out of the way an outstanding term, by ordering a party not to set it up, the Court has, nevertheless, out of its mere good will and pleasure, said, the party in possession shall not set up the statute of limitations, but the other party may, if he please, take thirty years, or fifty years, or any other given period, as the limitation of his proceeding?

The cases which have been cited upon this subject do not apply. Lord *Pomfret* v. Lord *Windsor* (a) was an equitable charge for a sum of money which they said had not been paid for twenty-seven years. The party had a right to ask, has it or not been paid? There is no statute of limitations to a bond; there is no statute

(a) 2 Vcs. 483.

of limitations to a charge upon an estate: the single question was, under what circumstances will the Court presume payment? Payment might have been presumed from length of time; but they could only set it up as matter of presumption, and it must be tried as a question of fact, just as in the case of a bond. In *Harwood v. Oglander* (a), the Court only removed a difficulty as to the trial at law upon the express ground that thirty-two years is no bar in case of non-payment of rent. *Keane v. Deardon* (b) only proves that, as long as the *cestui que trust* continues in possession of an estate, his possession is the possession of the trustees; and it would be very strange if any other rule could be adopted, for otherwise a *cestui que trust*, if he continued in possession twenty years, might make the estate his own. The two rights are completely distinct, and the possession of one is the possession of the other. But can any person doubt that Lord Clinton's possession from the death of George Earl of Orford was completely adverse to the other party? *Willis v. Shorrell* (c) was a case where a testator gave a power to raise a term, and by means of that term to raise a sum of money; and he charged the estate with the payment of that sum of money. The party in possession designedly levied a fine, and Lord Hardwicke said, if this had been a mere equitable charge, it would have been barred, but the power was not barred: it was a case of justice in which the Court ought to interfere. What was that, but saying, you have done an act, by levying a fine, which has deprived the party of his immediate remedy; but they still have another legal remedy, and, having that, the trustee shall make use of it for their benefit. So in this case, I am perfectly ready to admit,

1817.

 CHOLMONDE-
 LEY
 v.
 CLINTON
 and Others.

(a) 6 Ves. 199. 223.

(c) 1 Atk. 474.

(b) 8 East, 248.

1817.

CHOLMONDE-
LEY
v.
CLINTON
and Others.

for the sake of argument, that the circumstance of Mrs. Damer's being barred from bringing an ejectment, would not deprive her of the power of bringing a writ of right; but, as devisee, she cannot bring a writ of right. If she had had two remedies, (which she has not,) and only one was barred, then would this case be analogous to *Willis v. Shorrell*. In *Hovenden v. Lord Annesley (a)*, if we look a little further than to the passage that has been cited, we shall find that Lord Redesdale's opinion, in fact, was, that, even in case of fraud, the parties ought still to come within the twenty years. There is no pretence to say, this was a case of fraud: it is not attempted to be put upon that ground; but, simply, that Lord Orford was ignorant of his right. It is their business to make out that he was ignorant of his right; and this they have not done.

Held.

I. The questions to be considered on the deed of 1781 are, first, whether the intention we contend for can be made out; and secondly, whether the Court will construe the deed according to that intention?

In looking at the deed of 1781, I submit, that no person, even without the benefit of a lawyer's education, could have doubted what was the intention of George Lord Orford. It is not usual for a party to a deed to describe himself by his pedigree. It is still less usual or customary that any person stating his pedigree should describe it *ex parte maternâ*. There must have been some motive for such a peculiarity in this instance; and, taking it for granted that Lord Orford must have had some motive, one is not surprised afterwards to find a recital so clearly worded as that in the deed of 1781.

(a) 2 Scho. & Lef. 633.

“Whereas,” (for so he says in substance,) “I have by
“virtue of these recoveries obtained an estate in fee
“which would otherwise have descended to my heirs *ex*
“*parte maternā*, I am desirous that the same should con-
“tinue and remain in the family and blood of *Samuel*
“*Rolle*.” Now if any one were told that he had afterwards
limited that estate in a clear, plain way, so as to descend
to the heirs *ex parte maternā*, would he not say that the
deed was founded in mistake? That the framer of the deed
had not carried into effect the intention of the settlor?

1817.
CHOLMONDE-
LEY
v.
CLINTON
and Others.

Then, if the intention of *George Lord Orford* to settle
this estate in the family and blood of the *Rolles* is per-
fectly clear upon the face of the deed, I would ask,
whether, independently of any rule of law, it is to be
considered that he has so done? At the date of the
deed, *George Lord Orford* was seised in fee of this estate.
It is impossible to suppose that a man seised in fee-
simple, would, without cause, wish to convert that fee-
simple into an estate tail. It is equally impossible to take
for granted, that, being seised in fee, he would execute
a deed of this solemnity, and take so much pains in re-
citing the instruments by which he acquired the property,
for the mere purpose of doing that which he might have
done without a deed. There was no necessity for his
making a deed to create a power of appointment, any
more than to create an estate tail. He must then have
had some other motive; but it is not too much to say,
that, unless our construction of the deed is a correct
one, he meant what must be considered as a perfect
nullity.—Then is the intention for which we contend
such as the Court can carry into effect? Or will the
Court rather say that it is repugnant to some rule of
law—that there is some settled rule of law which pre-
vents the Court from construing the deed according to
the clear apparent intention? It must be admitted on

1817.

CHOLMONDE-
LEY.
v.
CLINTON
and Others.


all sides, that, in the exposition of deeds, the intention of the framer himself is to be regarded, unless the apparent intention militates against some rule of law. And we say, there is no rule of law militating against our construction.

I find that in not one of the cases which have been referred to, as far as I can judge, is there any rule laid down which can be said to have such an effect. In the case of *Fenwick v. Mitforth*, the ultimate limitation was to his own right heirs, not to the right heirs of another person, not being the ancestor to whom any particular estate had been limited, as in our case. Then again, in *Pybus v. Mitford*, (which, I confess, if Mr. Sugden had not cited it on behalf of the Plaintiffs, I should have adduced on behalf of the Defendants,) Lord Hale cited a case, where a son of the Testator's brother was admitted to take under a devise to the Testator's heir male, though he left three daughters, because of the manifest intention of the Testator. And in *Beaumont v. Yates (a)*, the son of a second marriage took under the limitation to heirs male by a second wife, though there was issue by the first marriage, the settlement being apparently made as a provision for the children of the second marriage.

There is a case (*Litt. sect. 354.*), which they omitted to state on the other side, although they expressly referred to that which immediately precedes it, and therefore the omission must have been intentional. "Also
" if a feoffment be made upon condition that if the
" feoffee shall re-enfeoff many men to have and to hold
" to them and to their heirs for ever, and all they
" which ought to have estate die before any estate made

(a) 1 Ch. Ca. 145.

“to them, then ought the feoffee to make estate to the
“heir of him which survives of them to have and to
“hold to him and to the heirs of him which surviveth.”

1817.

CHOLMONDE-
LEY
v.
CLINTON
and Others.

Jobson's case is another which I also consider a strong authority for us. In that case, it is evident, that the Testator could not intend his brother's daughter should have the land, at the time he made his will, because she did not answer the description given by his will, and therefore was not within his intention.

In *Doe v. Macey*, the limitation was to the Testator's own right heirs, which I conceive to be a material distinction from the present case. But, notwithstanding, the Judges in that case in giving their decision, unanimously referred to the intention. *Colson v. Colson* and *Hodgson v. Ambrose*, are cases which, if Your Honour shall think the rule in *Shelly's* case has nothing to do with this, are wholly out of the question.

Doe v. Lawson, and *Holloway v. Holloway*, were both cases of intention: the first was a mere point of construction, whether, by the next of kin, were meant those who were next of kin at the time of the Testator's death, or at any other time. In the other case, Lord *Alvanley* says, “Unquestionably, it is competent to a
“Testator, if he thinks fit, to limit any interest to such
“persons as shall, at a particular time named by him,
“sustain a particular character;” and then he proceeds to argue what was the Testator's intention. Most of the other cases which have been cited, appear to me in the same light; as *White v. White*, *Goodright v. Wells*, &c.


It is for them to show what is the rule which they consider as so inflexible; and it is for us only to point out the clear manifest intention.

1817.

CHOLMONDE-
LEY.
v.
CLINTON
and Others.

II. On the second question,—the deed of 1794 is as particular in its frame as the deed of 1781: there is nothing omitted in it that is at all calculated to show the intention of the parties; although, by some words introduced at the end, a different construction has been attempted to be put upon it, from what I conceive to be the plain purport of the deed, taking it from the contents and looking at it in all its parts. But they say, it is evident that *Horace Lord Orford* did not intend, from himself, to give to Lord *Clinton* his estates; that, on the contrary, he intended to take them to himself, if he could properly do so; but that, being in the dark, as to the effect of the ultimate limitation in the deed of 1781, and not knowing that he could acquire his end in any other manner but by the deed of 1785, as a revocation deed, he, with his mind intent upon that, and that only, conceiving he had no title to the property, gave up, in fact, nothing, but merely executed this deed to comply with the wish of Lord *Clinton*. Now, I submit that, upon the face of the deed itself, it is quite clear that this was not the view of *Horace Lord Orford*. It is quite clear, he was apprised that doubts existed as to the effect of the deed of 1785. We must take for granted that those doubts did exist, for it is so recited. Besides, Earl *George* had, by the deed of 1781, reserved to himself a power of appointment. He meant thereby to say, although my present intention is, that this property should go in the family and blood of the *Rolles*, yet I may change it, and therefore I will reserve to myself a power, either by deed, or by my last will, to alter the whole of these uses. Earl *Horace* knew therefore that Earl *George* had not, in 1781, made up his mind, that these estates should, merely in default of his own issue, go to the family and blood of the *Rolles*, at all events, but that he had reserved to himself a power of appoint-

ment. What more natural than for this nobleman, in 1794, to say, Do not call upon me to confirm an act of *George Lord Orford*, unless I know that *George Lord Orford* died with the intention that you should take this estate; for I do know that in 1781, it was not his positive intention that you should do so.—He reserved to himself a power of appointment over the estate, and if, therefore, I should be advised by counsel that *George Lord Orford* did exercise that appointment, what right have you to call upon me to carry into effect his supposed intentions? I submit that *Earl Horace*, if he was at all actuated by notions of this description, would, of course, pursue the plan that it is stated he did pursue. He would consult Counsel with respect to the effect of that deed—he would ascertain whether *Earl George* had or had not revoked the deed. How then does it follow that, because these doubts and difficulties are recited in the deed, for the purpose of accounting for it, as it were, that all the Counsel for the Plaintiffs contend that *Earl Horace* was ignorant of this question, which his quick-sighted successors have discovered? You cannot collect that from the recital; for *Earl Horace* might say, I know the intention of my nephew—I know it was his intention, in 1781, that you should take this estate—but how do I know that he died with that intention?

1817.

 CHOLMONDE-
 LEY
 v.
 CLINTON
 and Others.

But they say that *Earl Horace* was ignorant of the effect of the deed of 1781. Now, I do not apprehend that the Court will indulge a conjecture upon that. It may be that he was ignorant of the ultimate limitation; but can no other motive be attributed to him? If he had said, "I am willing to carry into effect my nephew's intention, but I want to know what that intention is;"—then he would have taken the course he did; but if he had said,

1817.

CHOLMONDE-
LEY
v.
CLINTON
and Others.

"I am determined to defeat my nephew's intention," then he would have looked into this deed of 1781, and ascertained whether that deed was a legal and valid deed, as against himself; and his omission to do that, must necessarily lead one into a belief, that he knew of the effect of that limitation. Is the Court, therefore, upon that mere conjecture, to take for granted that *Horace Lord Orford* was ignorant of the effect of that limitation? Suppose he were; then they say that this Court would rectify the deed upon the score of a mistake in *Horace Lord Orford*. Now, how is the Court to rectify deeds? Did any person ever hear of the Court rectifying a deed, upon a bill, which does not state one word in it concerning that deed, and prays no such relief?

But is it customary for the Court to rectify a deed upon conjecture? Is it enough for them to say, "*Horace Lord Orford* laboured under a mistake?" Where is the evidence of his labouring under a mistake?

I am not quite disposed to acquiesce in the opinion of the Court being willing to correct deeds, where the only ground for calling upon the Court is mistake; and I very much doubt, if the case was strong enough to make out that *Horace Lord Orford* did labour under the mistake which the Plaintiff's Counsel contend that he did, and if the bill were for that purpose, whether the Court would rectify it. The case of *Bingham v. Bingham* was somewhat singular in its circumstances; and, although cited as the strongest case on the subject, does not appear to me to make out the point; but all the other cases fall far short of it, being upon fraud or misrepresentation. And see *Myddleton v. Lord Kenyon* (a), *Pullen v. Ready* (b).

(a) 2 Vet. jun. 391.


(b) 2 Atk. 591.

1817.

CHOLMONDE-
LEY
v.
CLINTON
and Others.

In this case, there was no mis-statement—nothing was concealed—the deed was recited at length—the parties consulted their own lawyers. *Horace Lord Orford* was apprised of the intention of his nephew, and he says, nevertheless, “ I entertained a doubt, but, “ that being cleared up, I now come to convey, according “ to your request, all the estate and interest I have in “ this property.” But then it is said, if *Horace Lord Orford* knew of the effect of the deed of 1781, and that *Lord Clinton* was not entitled, by virtue of that deed, to this estate, still he took care to guard himself, so as to be able, at any time, to claim back these estates ; and this they endeavour to make out by reading the last words in this deed, wherein the estates are conveyed to the trustees of the settlement of 1792, “ upon such and “ so many of the uses, &c. as are now existing unde- “ terminated or capable of taking effect in the same “ manner as if the said indenture of the 6th of *June*, “ 1785, had not been made, and to and for no other “ intent or purpose whatsoever.” *Horace Lord Orford*, say they, only meant to put you into precisely the same situation as if the deed of 1785 had not been executed, and guarded himself from giving you a larger estate than you had under the deed of 1781.


Then, if they had filed a bill, claiming under the deed of 1781, supposing the legal estate to be outstanding, and that they had a mere equitable interest, we should say, you who come into a Court of Equity, must come with, what a Court of Equity calls, clean hands. A Court of Equity will not suffer you to keep back the information you have, and to execute a deed which, upon the face of it, would defraud every person who had any thing to do with the property. You, *Horace Lord Orford*, have, under your hand and seal, represented yourself to have known that this property

1817.

 CHOLMONDE-
 LEY
 v.
 CLINTON
 and Others.

descended to Lord *Clinton* according to the intention of *George Lord Orford*—whether *George Lord Orford* did so intend or not—is another question; but you have yourself, in that deed of 1794, represented *George Lord Orford* to have such an intention, and that the estates had vested in Lord *Clinton* in consequence of such intention. You have done much more, for you have been apprised, and stated yourself to be apprised, of two deeds which were executed in the year 1792, immediately after the death of *George Lord Orford*, whereby these estates had been conveyed and settled; and, by attempting to confirm those deeds, if you have any reservation of the kind imputed to you, you have induced parties to advance money upon hollow security, and have yourself led them into it.

The deeds contained powers of great extent; powers to grant leases upon lives for fines; powers to open mines; power to raise money upon mortgage; powers to sell, for raising portions and a jointure for Lady *Clinton*. The persons who advanced their money upon such provisions would have reason to complain if Lord *Orford* came to set aside that deed. How could Lord *Orford* or Mrs. *Damer* come here and ask to have this deed set aside, without making any one of these parties a recompense? Is the framer of that deed, who has confirmed the settlement of 1792, to set it aside, without making good the money advanced? I submit that *Horace Lord Orford*, having executed this deed, could not, himself, come into a Court of Equity, years afterwards, to set it aside, but that the Court would have said, as Lord *Thurlow* did, We cannot help such mistake and misapprehension—the titles of people cannot be rendered so insecure. You did, in a solemn manner, with every instrument before you, ratify and confirm, what you conceived to be the intention of *George Lord*

Orford; persons have advanced money upon that security; and, if we allow them afterwards to come and set aside the deed, we are rendering the property of individuals insecure. I think, therefore, it is important, it should not be understood, that this Court has rectified deeds on a mistake only; for all these observations would apply particularly to a suit instituted on the ground of mistake.

1817.

 CHOLMOND-
 LEY
 v.
 CLINTON
 and Others.

Now, if these arguments were worth any thing in the year 1795, they cannot be weakened when we consider that *Horace Lord Orford* acted under this mistake (if it is to be called so), and acquiesced in it; that he did nothing to vary the deed of 1794, so long as he lived; that he did not leave behind the smallest reason for any person, who succeeded him, to suppose, that he was dissatisfied; that, accordingly, we find *Lord Clinton* has quietly enjoyed this property from the year 1791; raising £44,000 upon the security of it; granting leases, by virtue of this deed, upon fines to an enormous amount; exercising every act of ownership for the space of twenty years; involving persons so numerous, and having such vast interests, that the Court cannot see in this suit, to what extent it may go. Then, when all these facts are coupled together, and when this deed of 1794 is not attacked till the end of twenty-one years, they think their cases strong enough to come into this Court, and say, It shall all go for nothing—We might, at any part of this period, have made out a strong case of mistake, and have come and set aside this deed.—There was no disability upon any of us for any part of that time;—yet, as if it were for the purpose of involving this property to the greatest possible extent, we will not come till the end of twenty-one years, and then we will come, and urge our complaint, upon a ground, which, if there is any thing in it, would as

1817.

CHOLMONDE-
LEY
v.
CLINTON
and Others.


much induce the Court to interfere at the end of two hundred years as of twenty,—that, inasmuch as the property is in the mortgage, and the mortgagee is willing to be redeemed, the property is ours.

Can any person suppose that a Court of Equity could listen to such claims as these?—that this Court, which has so often refused to interfere because parties have slept upon their rights, should adopt such a line of conduct as to say, you may come at the end of an hundred years, because you were originally the mortgagee, when other persons have sustained the characters of mortgagor and mortgagee in the interval? Would any man, having seen that another has advanced money, and received his interest from time to time from *A. B.*, having seen *A. B.* execute all acts of ownership, and grant leases; having seen suits instituted in the Court of Chancery to carry into effect the deeds which have been executed on the faith of these transactions; having seen the whole property accounted for in the Court of Chancery as the property of *A. B.*; having seen all this, would any man hesitate to lend his money upon such a title? And yet, if the argument of my learned friends is worth any thing, that sum of money so advanced, would be without security, and the mortgagor would only have to file a bill, and say, Your possession is my possession, and consequently I have a right to redeem you. You have lent your money upon a bad security; it is much to be lamented, but it cannot be helped; the rightful owner cannot be defrauded of his property, and as it is in the case of lessor and lessee, (for that was the expression used), you have no redress.

III. I will now say a word or two as to length of time. I will not dwell long upon it; but I apprehend that this Court has acted throughout by analogy to the

statute of limitations. I forbear to comment upon the argument respecting a writ of right, because, I think, it is conceded that Lord *Cholmondeley* has no title whatever to this property, and consequently that argument fails. The fact, of the estate being outstanding, does not give Mrs. *Damer* (as devisee) any right to come into a Court of Equity by an ejectment bill after the legal time has expired. There are several cases to the contrary, and I have heard no case cited to support it. The doctrine of the Court upon this subject is not of modern date. I find a case as long ago as the reign of *Charles I. (a)*, where the Plaintiff sought to set aside a conveyance made by his father twenty years before, and when the father was eighty years old and *non compos*. The Court said, they would not try the question of *non compos* after twenty years. It is not necessary for me to consider whether the Court would now so treat a case of that sort, upon a clear ground of fraud, at the end of twenty years. It is enough that the Court has looked, without any statutable direction or enactment, upon the subject of length of time from a very early period, as a reason for refusing to interfere; and that this has been followed by a vast variety of decisions, ever since, which are dispersed throughout the books, and has been carried to so great an extent, that, where infants have had beneficial interests in matters of account, they have been barred because they were represented by the administrators.

Upon the whole, I submit that we stand firm upon the deed of 1781;—if not, still that the deed of 1794 would completely bar the interest of the Plaintiffs, and prevent them from coming into a Court of Equity to be relieved;—that where a man, (for instance), has granted

1817.

CHOLMONDELEY
 v.
CLINTON
 and Others.

(a) 1 Cha. Rep. 40.

1817.

CHOLMONDE-
LEY
v.
CLINTON
and Others.


a piece of land, and another has built a house upon it, and exceeded the boundary, and the man has been an eye-witness to his having built his house beyond the boundary, the party who stands by, and silently permits that to be done, cannot come into a Court of Equity for relief. It is not we who come here for relief.—We stand upon the defensive upon the title which we have had for twenty-one years. And lastly, I submit that Mrs. *Damer* cannot be considered even in the same light as Earl *Horace* in 1795; and that, standing in the situation in which she does, they do not make out a case which entitles them to take this from Lord *Clinton* after the length of possession which has been permitted.

Preston.

It is not my intention to change the line of argument adopted in this case; so that, in arguing it, I shall contend, first, that Lord *Clinton* has a title on the sound construction of the deed of 1781; secondly, that he has a title under the deed of confirmation; thirdly, that he has a title by the known law of this Court, under the head of acquiescence; and, fourthly, that he has a title on the ground of lapse of time.

I. The arguments that have been advanced put the case on a ground which never appeared to me capable of being urged with success, namely, that the interpretation of this deed, according to the apparent intention, is prevented by the operation of some positive rules of law. I shall therefore argue those rules of law, and ascertain whether they do, indeed, impose upon us any difficulty in entering into the intention of the grantor; because, if there are any rules which deny the power of this nobleman to give the estate in the manner he has done, I am prohibited from that enquiry.

The difficulty stated is of this nature; that there are rules of law which deny to a man the power of granting to the right heirs of his ancestor. They must go to the whole extent of that position to support the argument; and I am not aware of any rule of law, or any authority, to bear them out. If they argue that a man cannot grant to himself, and therefore as *George Earl of Orford*, the grantor, was in this instance the right heir of *Samuel Rolle*, the limitation is void, I can understand the proposition; but I should still deny its application. For the purposes of the argument, I am willing to admit that, if these limitations had been found in a deed at the common law, and if the grant had been to the right heirs of *Samuel Rolle*, while *Lord Orford* was right heir, upon a rule of law too well known to require illustration, it would be impossible he could take under his own grant. But these limitations are to be found in a conveyance to uses; nor is there any legal impediment to the owner of an estate granting to the use of himself, or to the use of the heirs of his body.

1817.

 CHOLMOND-
 LEY
 v.
 CLINTON
 and Others.

I admit that he cannot make his right heirs purchasers in a conveyance to uses; but, in this case, the limitation is, not to his own right heirs, but to the right heirs of *Samuel Rolle* his ancestor.

I admit that, if this had been a grant to *Lord Orford*, with remainder to the heirs of his body, with remainder to his right heirs on the part of *Samuel Rolle*, the doctrine in *Shelley's* case would apply; but will they say, that a man cannot grant an estate of inheritance if he keeps within the bounds of succession?

But they say, first, this is a grant to the right heirs of *Samuel Rolle*—*Lord Orford* was himself the right heir

1817.


CHOLMONDE-
LEY
v.
CLINTON
and Others.

—such a limitation is therefore void, or it is his old reversion. Now I deny, first, that it is void; and next, that it is his old reversion. It is not a limitation to himself and his right heirs, but to the right heirs of another person. Now, if this limitation had been found in a deed at the common law, it would be good. All the cases admit, there may be a grant to a man for life, remainder to the right heirs of another. *A fortiori*, a man may limit to himself for life, with remainder to the right heirs of another. Then, as to the intention,—the doctrine of resulting uses, (which is not a rule of law but of equity,) shows the regard paid to intention; as the Court there acts on the presumable, frequently in opposition to (what may appear) the express intention.

The question then is, whether the intention requires that this limitation “to the right heirs of *Samuel Rolle*,” by way of use, should give a vested estate to Lord *Orford*, as the then right heir, or to the person who, after the determination of the prior estates, should answer the description. I am to contend, that the estate was to vest in the person who, at the death of Lord *Orford*, and the failure of his issue, should answer that description.

Now, in order to show that it vested in Lord *Orford*, they are obliged to resort to certain rules of law. They say, the law favours the vesting of estates. I admit it, but with its due qualification, that is, when the intention of the grantor requires it. I do not deny that the law favours the principle, nor do I deny the simplicity of the law, which has been so much commended; but I infinitely more admire the policy of present times, which favours the intention of men to give an estate as they think fit; and, in spite of rules of tenure, directs that intention to be observed.

[See Lord C. J. *Willes's* judgment in *Smith dem. Dormer v. Parkhurst* (a)].

1817.

 CHOLMONDE-
 LEY
 v.
 CLINTON
 and Others.

Before I enter into an examination of the deeds, I will state a few authorities to show that it has not been considered so clear as it is said to be, that technical words shall uniformly receive their native genuine signification. In *Spark v. Spark* (b), a gift was made to a man for his life, with remainder to his executors; and the Court determined that the remainder vested in him. But in the case of Archbishop *Cranmer* (c), he gave to himself, with remainder to his executors; and at the end of the report of the former case (which is quoted by *Gilbert*), is the following observation: "Note, that in this case" *Walmsley* said, the difference between this and *Cranmer's* case is, because it is there limited by way of use, " (as it is here) and by the party himself—so he shows " his own intent, that it should not vest in himself but " in his executors. But here the limitation is by a " stranger, wherein there is not any intention appears " but that it should vest in the lessee himself; and by " this difference all the books are reconciled." Now I will venture to say, that a single case cannot be found to contradict this, nor which bears so strongly and forcibly upon the present.

It will be objected, that there is a difference in the construction of deeds and wills; but I deny this; with a single exception,—that, in the case of a deed, technical words must be used to give an estate more than for life only. In *Wheatley v. Thomas* (d), in investigating the question, whether right heirs will take after the attainder of the parent, it was put in this way; that, because

(a) *Willes*. 332.

(b) *Cro. Eliz.* 666.

(c) *Dyer*, 309.

(d) *Keble*, 349.

1817.

CHOLMONDE-
LEY
v.

CLINTON
and Others.

the blood *may* be restored, a limitation to the right heirs *may* be good.

If a man limits an estate, held by the ordinary freehold tenure, to his right heirs in *Borough English*, though in an ordinary case it would vest in the common law heir, in this case it will vest in the heir of *Borough English* by force of description (a). And in *Hodgson v. Bussey* (b), Lord *Hardwicke* says, "Notwithstanding they sound like words of limitation, yet, upon circumstances, and the intention of the parties, they may be construed words of purchase." And he referred to the cases of *Lisle v. Gray* (c), and others, most distinctly establishing the proposition that, though the words "heirs of the body," standing *per se*, will give an estate of inheritance, yet, taken in context with the other parts of the deed, they may become words of purchase, and give the estate to the person answering that description.

So in *Beresford's* case (d), words formerly held to create an estate in fee, were held to convey an estate tail. See the reasoning of the Court in that case.

But all the doctrine that has been advanced, about the favouring of the vesting of estates, is in direct opposition to the principle in *Baldwin* and *Karver*, and other cases which were lately brought before the Court in the arguments of the case of *Mogg v. Mogg* (e), to show that, in some instances, a rule of law may control the intention of the party, but that the intention of the party shall prevail, if it can, consistently with the rule

(a) *Counden v. Clerk*, Hob. 31.

(b) 2 Atk. 89.

(c) Sir Thomas Jones, 114. See *Fearne*.

(d) 7 Rep. 135.

(e) *Ante*, vol. i. 654. 677.

of law. In *Baldwin v. Karver*, as in *Mogg v. Mogg*, there was an estate devised to a class of persons, and it was contended that it must vest in them immediately on the death of the testator ; but the Court said, "No—
" there is a general intention in favour of a large class
" of persons, and all persons who shall come *in esse*,
" and can take, shall." The doctrine goes further, as was proved in *Mogg v. Mogg* ; for, if the devise be by way of use, and not fettered by the common law doctrine of remainders, the estates shall not vest immediately, but shall open to admit those who can answer the description at any time. Therefore, I am altogether to deny that there is any such principle, or any such rule, as a general rule, that estates shall vest immediately, because they might vest by putting on them a construction contrary to the intention. I say, the sound rule, and that on which I will rely in this case, is, that you must first find the intention, and then enquire whether it is consistent with the rules of law. If it is inconsistent with the rules of law, it must fail ; but if there be no rule of law to defeat such a limitation, so considered according to the intention, that intention shall avail. And this doctrine is acknowledged by Lord Coke.

1817.
CHOLMONDELEY
v.
CLINTON
and Others.

There is a most elaborate judgment on this point in *Crone v. Odell* (a). And see *Minshull v. Minshull* (b), *Darbison v. Beaumont* (c), *Newcomen v. Barkham* (d), *Perriman v. Peirse* (e), which was cited from *Rolle*, is differently reported in *Palmer*, where it is said the Court held that the express estates given to the two daughters "excluded them and their issue to take any other estate

(a) 1 Ball and B. 449.

(b) 1 Atk. 411.

(c) 1 P. W. 229. 2 Eq. ab.

351. See Fearn's C. R.

320.

(d) 2 Vern. 729.

(e) Palm. 204. 303.

1817.

CHOLMONDE-
LEY
v.
CLINTON
and Others.


“ by implication ;” and so all belonged to the elder daughter, who had no provision, in exclusion of the others who answered the description. The case cited from *Littleton* (sect. 354.) is founded in principle ; and the reason assigned by Lord *Coke* is exactly consonant to the doctrine I am now asserting, viz. to give effect to the intention. The same principle holds good in the case of a gift for life, with remainder to the right heirs of a woman, which vests in the person who answers the description, and becomes, through him, transmissible to his heirs *ex parte paternâ*, in consequence of the rule that you cannot limit an estate so as to descend to the maternal line.

It is said that our construction will not answer the intent, because you may happen to meet with a person who, though a *Rolle*, may transmit the estate to a *Trefusis*. Why not ? because the rule of law intended it—because the rule of law imposes it as a necessary consequence. But our enquiry is, who is to take *by purchase* under this gift ? The law is satisfied if you have once found the right heir of *Samuel Rolle*, who can take by virtue of this limitation.

It is said, what was the value of this limitation, being made, as it is, revocable at pleasure,—that an intention must be inferred from it contrary to the express words ? But is not a will essentially revocable ? And shall it be said that the intention of the testator is therefore not to prevail ?

In the recitals of this deed, Lord *Orford* gives himself a designation and character, which must have been part of the motive to introduce the subsequent provisions. He recites himself to have descended from a *Rolle* ; he recites the mode in which he acquired the


property; but he stops short at the point of the limitations in the will to *John and Samuel Rolle*—the strongest evidence that Lord *Orford* had not in his contemplation to put the estate in a line of succession with reference to them; and, whether he had or not, is not material on the present occasion, for the Plaintiffs must recover, if they do recover at all, on the strength of their own title, and not on the weakness of ours.

1817.

 CHOLMOND-
 LEY
 v.
 CLINTON
 and Others.

There is another point in this case, to which we are led by Lord *Macclefield*'s observations in *Howard v. The Earl of Suffolk* (a), where he says, "Equity, even for
 " younger children, supplies the want of a surrender of
 " a copyhold, and puts them on a level with creditors,
 " taking it to be a debt by nature from a father to pro-
 " vide for all his children. But is it not a stronger case,
 " where the King has bestowed an honour on a family,
 " whereby the heir of the family is *consiliarius natus*,
 " and sits as a Judge in the highest Court—the House
 " of Lords? Surely it is incumbent on the ancestor
 " to have some provision for the maintenance of the
 " honour, and looks like want of gratitude to the Crown
 " (from whence this honour did arise) to leave it naked,
 " especially where the ancestor had a great estate in his
 " power, and has given it from this Earldom." Now,
 in this case, Lord *Orford* not only had the estate, but he
 had it from the family in which he knew the claim to
 this barony to reside. And, as Lord *Kenyon* says, in
Sapsford v. Fletcher (b), "It is incumbent on a party
 " who wishes to establish a rule contrary to all justice
 " and equity, to produce some authority, showing that
 " there is an inflexible rule of law, established in oppo-
 " sition to justice."

(a) 2 P. W. 177.

(b) 4 T. R. 512.


1817.

**CHOLMONDE-
 LEY**
 v.
**CLINTON
 and Others.**

Then, after having introduced this recital, and after having stated that he had suffered a common recovery, Lord *Orford* puts a negation upon his own right, by saying, "But the said *George* Earl of *Orford* is willing " and desirous that the same premises should continue " and remain in the family and blood of the said *Samuel Rolle*." He could not, by any artificial means whatsoever, have shown a more express negation of the right heirs of the *Walpoles*, than by these important words. And, when connected with the words which follow, "In consideration, &c." they amount to the clearest demonstration of an intention to give to the right heirs of *Samuel Rolle*, as descriptive of other persons than himself. Now, that a recital is to be taken into consideration upon the construction of deeds, appears from several cases. See *Moore v. Magrath* (a).

But it is said the deed does nothing. In my view, it does every thing. It was Earl *George's* intention, while he lived, to keep as much dominion as possible over the property, at the same time marking his destination of it, after his death, to those for whom he was bound to provide. And then after advancing the rules of law in opposition to our going into the intention, they pretend that this is a gift to himself. Does he name himself in it? Does he not say, it is not for himself, but for his relations? Does it not mean to provide for the *Rolles*, and not for the *Walpoles*?

But they say, "It is worth nothing; it was all left in "his own power." Granted. It was what he meant. He merely says, "I will not trust to the chances of accident—I may die unprepared—I will make a testamentary deed, (as it has been properly called,)—I

“ will make a provision, by which, if I shall die without issue, and without appointment, this estate shall go to the *Rolles*.”

1817.

 CHOLMONDE-
 LEY
 v.
 CLINTON
 and Others.

They say, that is very singular—he does not designate any person. But it is enough for me that he does not designate himself. If the limitation had been to himself and his right heirs on the part of *Samuel Rolles*, I am ready to confess that the rule of law would be too strong for the intention; but no rule of law can be produced to defeat the intention in this instance. To have given it, by name, to any person, would have been to defeat the object. The very design was, that this property should go over, at the moment of the failure of Lord *Orford's* issue, to the person who should then fill the dignity, and require the property to support it. Wisdom itself could scarcely have framed a limitation better adapted to answer the purpose for which it was designed. I never saw a case so strong in point of intention. Nothing but some rule of law can defeat it; and there is no rule of law to raise an impediment to the observance of it.

“ In obscure and dark sayings, we are to judge according to that which is most likely (a).” If this were a gift to himself, what good would it do him? Would it give him more than he had already? It would be absurd to give to himself, especially with the objects he had in view. The matter of course was to provide for the blood of the *Rolles*, in such a manner as that, after his death, he should have put the estate in a proper order of succession; and he has done so.

But it is said, we cannot fix the time of the limitation vesting; and therefore it is void for uncertainty. To

(a) Shepp. Touchst. *ubi supra*.

1817.

CHOLMONDE-
LEY
v.
CLINTON
and Others.

this I answer, that by law and justice, the Court is to find out a construction, unless it is impossible to put a construction upon it. If it be capable of any construction, it is the duty of the Judge to find it out, as Lord *Hardwicke* did in *Minshull v. Minshull*, and as Judges in all times have done. "The sense of words is to be sought out by the calls and occasions of speaking them. *Verba debent intelligi secundum subjectam materiam.*" Now what, in this case, were "the call and occasion of speaking?" To provide for the settlor's relations of the blood of the *Rolles*. He has not provided for them in any manner, unless this is a provision.

There never was a case that has less bearing than that of *Moselley v. Massey (a)*, because the Judges showed most clearly that there was a total absence of intention; the mind was active with reference to other points of the will, and was passive in reference to the gift "to the right heirs." I will mention another case to show that words are not inflexible,—that rules of law will bend to the intention. In the case of *Roe v. Quartley (b)*, a devise to the right heirs of husband and wife was held, from the relation of the parties, to be a gift to the right heirs of their bodies, and that the children took by way of purchase. That is enough for my purpose, which is to show that there is no magic in words. You must find out the intention, and give it effect, and then you become wise expositors.


In *Worsley v. Johnson (c)*, the wife was excluded from taking under the statute of distributions, by a restricted sense of the word "relations;" because it was improbable the testator could have meant her to take, having

(a) 8 East, 149.

(c) 3 Atk. 761.

(b) 1 T. R. 630.

before given her an estate for life. So, in this case, nothing can be more improbable, nay, more absurd, than to think that Lord *Orford* was, by this gift, providing for himself under the description "right heirs of *Samuel Rolle*." He had already provided for himself in every way, by giving himself an estate for life, and a provision for all the descendants, with a power to do what he pleased with the property. In every case of a gift to a man's right heirs, the intention is, to give, not to the man himself, but to the persons who shall be his right heirs; and it is only by virtue of a rigid rule of law, (as when it happens to fall within the rule in *Shelly's* case,) that the intention is disappointed.

1817.

 CHOLMONDE-
 LEY
 v.
 CLINTON
 and Others.

II. The deed of 1794 is not a Release, but an absolute Conveyance. If they say it is a Confirmation in point of title, the answer is, that a Confirmation can have no condition annexed to it by law. If they say it is a Confirmation for a limited time, I answer that they are mistaken again; because it is clear from *Littleton* (sect. 519.) that if a man confirms for life, it is an effectual deed to confirm in fee; and *Coke* says, the reason is, that a confirmation to a disseisor in tail, or for any particular estate, is of the like force as a release. [See also section 521.] But, if they insist on the recital in this deed, as limiting its operation, let them at least give us the benefit of the recital in the deed of Settlement.

This is a Confirmation, not only to Lord *Clinton*, but to all the branches of his family. It was made on the occasion of an attempt to raise money,—a circumstance which will be strongly pressed by the Counsel for the mortgagees. It is not pretended that we knew of any defect in our title; and then it is said, this deed is nothing—it is cut down by the restrictive words. Are we

1817.

CHOLMONDE-

LEY

v.

CLINTON
and Others.

to weigh them in scales? Are we to give them one meaning, when they are capable of another?

The deed itself recites, that "doubts had arisen." We must suppose that Earl *Horace* participated in those doubts; and, so participating, he nevertheless executes the deed to remove them. How can it be said, that he knew the doubts were nugatory, and that he therefore confirmed the estate, meaning to do nothing but to make a show of generosity at no expense? On the contrary, the execution of the deed, for the purpose of removing any objection, is, of itself, the strongest evidence that he would have done the same if he had known of the existence of the other objection. Take the recitals together, and what do they amount to? "I admit, there is an intention in your favour. I admit your title as maternal heir. The only question is, whether there has been a revocation of that by the mortgage? If there has, I shall not avail myself of it; and I will not only confirm the deed of 1781, but I will go further, and confirm all the uses in your settlement."

III. I next come to the point of Acquiescence. The doctrine of Acquiescence I take to be distinct from the doctrine of the limitation of time in analogy to the statute. As to Acquiescence, the Court has no fixed time. It judges from circumstances and convenience; and therefore, in some instances, a less period than twenty years, (as in *Swanston v. Raven* (a), fifteen years acquiescence in the case of husband and wife,) has been held to bar. And see *Nicholls v. Leeson* (b), *Stockley v. Stockley* (c), *James v. James* (d), *Earl of Portsmouth v.*


(a) 3 Atk. 105.

(b) 3 Atk. 575.

(c) 1 Ves. and B. 29.

(d) 1 Eq. ab. 123. pl. 11.

Earl of *Effingham* (a), *Bell v. Cudell* (b). And it is important to be observed, especially with reference to the next point in the case, that we are not here on personal rights; but it is the question of a real estate, which has a direct limitation of time.

1817.

 CHOLMONDE-
 LEY
 v.
 CLINTON
 and Others.

IV. The last head of argument is upon the limitation of Time, as to which I conceive Your Honour's judgment, in *Beckford v. Wade* (c), to go the whole length of this case.

A case has been mentioned, of *Davie v. Beadsham* (d), which appears to me to afford an answer to a great part of the argument in the present. In that case, there was a trustee by the construction of a Court of Equity, but because he had acquiesced in the title of the customary heir, and paid him rent, the Court would not afford relief. That was a stronger case than the present. *Frank v. Frank* (e) was also a case of mistake, but the Court there said, that "*Modus et conventio vincunt legem.*"

In *Hovenden v. Annesley* (f), this subject of limitation of time was very much discussed by Lord *Redesdale*; and I will venture to say that his judgment throughout is word for word conclusive against the Plaintiff. The same point has since been before Lord *Manners*, in *Medlicot v. O'Donnell* (g), where he says, "It has been suggested that I lay too much stress upon length of time, and that I attach more credit to it than Lord *Redesdale* or any of my predecessors have done. I confess, I think the Statute of Limitations is founded

(a) 1 Ves. 430.

(e) 1 Cha. Ca. 84.

(b) Amb. 101.

(f) 2 Scho. and Lef. 622.

(c) 17 Ves. 97.

(g) 1 Ball. and B. 156.

(d) 1 Cha. Ca. 39.

1817.

CHOLMONDE-
LEY
v.
CLINTON
and Others.

“ upon the soundest principles and the wisest policy; and
“ that the Court, for the peace of families, and to quiet
“ titles, is bound to adopt it, in cases where the equitable
“ and legal title so far correspond, that the only differ-
“ ence between them is, that the one must be enforced
“ in this Court, and the other in a Court of Law.

This is a case in which we must treat *Mrs. Damer* as the only Plaintiff; and it is an acknowledged principle of law, that a devisee cannot maintain a real action till actual seisin. [See *Co. Litt.* 111. a. and again 240.] The same doctrine is to be found laid down by Lord *Redesdale* (a); from all which I submit, that, as no ejectment could now have been maintained at Law, so there is no remedy in Equity.

For the Defendants, St. John and Fortescue, (trustees in the settlement of 1792.)

Benyon,

[After insisting that these Defendants were parties materially interested under the provisions of that deed, and that the construction maintained by Lord *Clinton's* Counsel of the deed of 1781 was the true construction,]

As to the second point, (the Deed of Confirmation,) contended, that it was a deed equivalent in its operation to a feoffment; that it would be a novel proceeding for a Court of Equity to interfere to rectify one deed according to a supposed intention, which, if it were to take effect, would defeat the intention expressed in another deed, and contrary to every known rule of law to defeat an absolute conveyance.

(a) 2 Scho. and Lef. 104.


As to the third point, (the limitation of Time,) he denied that a mortgagor is only tenant at will to the mortgagee, except with reference to the right of taking immediate possession on non-payment of principal or interest. For many purposes, the mortgagor is considered, even at law, as owner of the estate. *Brown v. Gibbs* (a)—“ A mortgage is a personal contract, and the mortgagee has no interest beyond his money.” So *Casborne v. Scarfe* (b), *Fawcett v. Lowther* (c), &c. An equity of redemption constitutes a qualification to kill game, to vote at elections, to act as a magistrate, &c. On the same principle it is that, in Equity, a mortgage in fee is considered as a revocation, only *pro tanto*. It is monstrous then to say, that, although as to other purposes he is the owner of the estate, yet as to the analogy from the statute of limitations, that does not apply to his case. Such a doctrine would be of the most alarming tendency, regard being had to the number of estates which are handed down from father to son merely as equities of redemption, the legal estates being outstanding in mortgagees. In such cases, if twenty years be no bar, so neither are fifty, or five hundred.

On the part of these trustees, the argument of Acquiescence is strong indeed. With a full knowledge of their rights in all the parties, these trustees have been suffered to go on from year to year, managing the estates, and exercising all the extensive powers which the settlement gives them ; when a suit has been instituted, under which order upon order of this Court has been obtained. If ever a title of Acquiescence ought to prevail in a Court of Justice, it is that as between the Plaintiffs and these Defendants.

(a) Pre. Cha. 99.

(c) 2 Ves. 300.

(b) 1 Atk. 603.

1817.

 CHOLMONDE-
 LEY
 v.
 CLINTON
 and Others.

1817.

CHOLMONDE-
LEY
v.
CLINTON
and Others.

Blake.


On the question, as to the limitation of Time—I apprehend it is an original principle of this Court, wholly independent of the Statute of Limitations, to hold Time a bar to equitable relief. The Court fixes the measure of time by analogy to the statute, confining it to the period allotted for the legal remedy by ejectment. This rule is laid down by Lord *Talbot*, in *Belch v. Harvey* (a), where his words are very remarkable, and go to the full length of my position as to the generality of the doctrine. It is the same principle which Mr. *Sugden* has so clearly and distinctly laid down in his book upon the law of vendors and purchasers (although it now unfortunately happens that he is bound to contend for the reverse of that argument), where he says, “The statute of limitations certainly cannot operate as “between *cestuis que trust*; but it seems that Equity, in “analogy to the statute, will hold Time a bar; and in- “deed that equitable rights in general will, by the like “analogy, be effected by time in the same manner as “legal estates (b).” But the present case is argued as if this rule did not at all apply to it. It is stated that the mortgagee had a constructive possession—he was in receipt of the rents and profits; therefore, in the eye of the law, he was in possession of the estate itself; but it is evident that this is merely a fiction, and such a

(a) 3 P. W. 287. note.—
And see a fuller statement of
the case in *Sugd. V. and P.*
App. p. 35.

(b) P. 296. (4th ed.) See
also p. 295. “The rule in
equity, that the statute of
limitations does not bar a
trust estate, holds only as
between *cestui que trust* and

trustee—not between *cestui
que trust* and trustee on one
side, and strangers on the
other; for that would be to
make the statute of no force
at all, because there is hardly
an estate of consequence
without such a trust, and so
the act would never take
place.”

fiction as no Court of Justice will feel inclined to adopt in a case circumstanced as the present. The rule of limitation is not a hard rule, nor founded on any rigorous institution of positive law, but on a sound principle of moral equity—a principle which it is the policy of the law rather to extend than to confine, and which has been accordingly extended, in some remarkable instances, by statutory enactments, during the present reign.

1817.

 CHOLMOND-
 LEY
 v.
 CLINTON
 and Others.

The cases which have been cited have no reference to this question. The principle on which the Court proceeded in *Pomfret v. Windsor* (a), was one which is well known to a Court of Equity,—that the Statute of Limitations affords no protection to an administrator, but the party entitled may call for his distributive share at any period. A fine can only operate as a bar, where the rights of the parties are adverse. The possession of Lord and Lady *Windsor* was not an adverse possession. *Harmood v. Oglander* was never decided, but went off on a compromise. In that case, time was not alleged to operate as a bar, but by way of evidence, as raising a presumption of *ouster*. The party claiming did not dispute the title of those in possession, but alleged a title in himself to hold with them as tenant in common. Now, the statute does not apply to a tenancy in common; neither do the facts of that case in any respect resemble those of the present. There is only one possible way in which it can be brought to affect the right of Lord *Clinton*. The Plaintiffs may say, that, inasmuch as Lord *Clinton* acknowledged the mortgage to be a subsisting mortgage, he has acknowledged that the equity of redemption is, as it appears to be, in the heirs of George Lord *Orford*. But can they attempt

(a) 2 Ves. 472.

1817.

CHOLMONDE-
LEY

v.


CLINTON
and Others.

to found any right upon the mortgage deed? If they do, we meet them with their deed of confirmation, executed, by their own admission, for the very purpose of doing away the effect of the mortgage deed altogether. If they do not put their right above that mortgage deed, they do nothing. Then, upon what foundation in common sense are we told that this mortgage deed is to have the effect of preserving their rights *in infinitum*, provided only that it is acknowledged to be a subsisting deed?—that a party claiming an equity of redemption may sleep upon it for a hundred years, and, awaking at the end of that period, (provided the mortgage still subsists,) may find his right as vigorous as ever?

The case of *Willis v. Shorrell* (a), has been fully answered, as to any supposed applicability to the present; but there is a passage in the Lord Chancellor's judgment in that case, to which I would refer. Lord Hardwicke says, "No doubt, the rules of this Court, with relation to fines, have been taken, by analogy, from the rules of law, and the effect is the same with regard to an equitable interest, if of such a nature, that, turned into a legal interest, it would have been barred." Now, if a fine by analogy to the rule of law, will operate upon an equitable interest as it would on a legal interest, so, I apprehend that length of time will operate upon an equitable interest as it will upon a legal interest. But when they say that the fine of the mortgagee cannot bar the mortgagor, it seems rather extraordinary that they do not proceed to that which is the true question in this case,—whether the possession of the mortgagee will bar the mortgagor. And I apprehend that a possession of twenty years will have that effect, if the mortgagee does not, during that period, recognise, by some act or expression, the

(a) 1 Atk. 474.

right of the mortgagor, as a subsisting right. The mortgagee originally enters into possession in a confidential character; yet, if the person, in trust for whom he so entered, chooses to sleep on his rights, the rights are barred. Then how can it be maintained, that, if a stranger enters into possession, the same consequence does not follow? The possession of the mortgagee operates as a bar,—not because he has the legal estate,—not because it may be a hardship to call him to account at a distant period,—but because the mortgagor has been guilty of *laches*—has done no act to keep alive his equitable title. And so it is in the other case.

1817.

 CHOLMONDE-
 LEY
 v.
 CLINTON
 and Others.

The case of *Pimm v. Goodwin*, which is still *sub judice*, has been alluded to; in which case the *Lord Chancellor* is understood to have expressed his opinion (although not in the shape of decision), that every person who becomes successively entitled to an Equity of Redemption, has his twenty years from the time of his right accruing, and is not barred by the *laches* of his predecessor, that is, that where a person enters as trustee for *A. B. and C.*, in succession, and *A.* neglects to assert his rights, he is barred; but, as to *B. and C.*, the trust still continues. Nothing can show more clearly that the principle upon which length of time operates as a bar, is the neglect of the party who has the right, and that only.

For the Defendants, the Representatives of Sir Lawrence Palk.

Hart.

First, this Bill must be dismissed, as to the Marquis *Cholmondeley*, for want of interest. The rule of the Court amounts to this,—that, if two individuals concur in bringing into litigation a title to relief, and it turns out that one has no title, with reference to that individual who has no title the bill must be dismissed, but

1817.

CHOLMONDE-
LEY
v.
CLINTON
and Others.


the Court may still proceed to grant relief to the other, in case he can make good his claim. [See, on this point, Lord *Redesd.* Plead. in *Chanc.* 2d ed. p. 146.] With regard to the interest which Lord *Cholmondeley* pretends to have in this suit, another question may be made,—Whether it does not fall within the compass of the statute, 32 *Hen. VIII. c. 9. s. 2.* “Against brachery and buying of titles.” And see *Hitchen v. Landers* (a).

On the points which have already been made,—

As to the first,—the effect of the deed of 1781;—the case of *Doe v. Maxey*, so often referred to, establishes only the principle that the Court will endeavour to find the intention, in order to put such a construction on the settlement, whether by will or deed, as shall give effect to it.

II. As to the Deed of Confirmation;—the Plaintiffs must put their case in one of these two ways. They must either say, That deed in legal construction, does no more than remove out of the way the mortgage deed of 1785, and therefore we require the assistance of the Court only against the prior legal title;—or they must say that the effect of the confirmation is to transfer absolutely all the estate of Earl *Horace*, and that they come to have it rectified here, on the ground of mistake, as going beyond the actual intent of the parties. Now, by the frame of this bill, they have taken the first of these grounds, and they are not at liberty to contend on that of mistake, because it is not in issue. Mistake is a fact which may be repelled by evidence. Then we meet them on the effect of the deed itself; and we maintain that the deed is, to all intents and purposes, an

absolute conveyance. Now, one of the purposes of the settlement which this deed was intended to confirm, — that of 1792, was to raise money to enable Lord *Clinton* to purchase certain estates in the neighbourhood of the main part of this property, which estates were afterwards purchased accordingly; and one of them, to the extent of £4000, was purchased by the trustees from Lord *Orford* himself. To that extent, therefore, he must be considered as a party immediately interested in the deed of confirmation. He was applied to by the trustees to confirm their settlement for the express purpose, among others, of enabling himself to sell that estate.

1817.

 CHOLMONDE-
 LEY
 v.
 CLINTON
 and Others.

Suppose, however, that Earl *Horace* himself—much more, that his heir at law or devisee—had filed this bill for the purpose of setting aside the deed of confirmation on the express ground of the alleged mistake, without allegation of fraud or surprise; this would be entirely a new case for the interference of a Court of Equity, under such circumstances as the present. It would be entirely a new Equity to call on the Court to correct one mistake for the purpose of letting in another, — to render void an act, by the operation of which (though accidental) effect is given to a declared and positive intention, which accident only had rendered abortive; — not to revest a title which ought to exist, — but to divest a title which, in conscience, ought to have no existence.

III. All the cases which have been relied upon as to the point of Time, are referred to upon the fallacious notion which assimilates the characters of *cestui que trust* and trustee to those of mortgagor and mortgagee; but no characters can be more distinct than these. It is said, there can be no equitable disseisin, for a mortgagor is only tenant at will to the mortgagee. Under

1817.

CHOLMONDE-
LEY
v.
CLINTON
and Others.


some qualifications, and for some purposes, I admit that he is so considered. The one cannot disseise the other, because their titles are concurrent, and therefore, as between them, there can be no disseisin. But, if a mortgagor may be seised of an equity of redemption, why may he not be disseised also? His seisin consists in the lawful possession of the estate against all the world but his own mortgagee. It is a possession which enables him to do every act not inconsistent with that mortgagee's title. Lord *Hardwicke* says, in *Casborne v. Scarfe* (a), "An Equity of Redemption has always been considered as an estate in the land; for it may be devised, granted, or entailed, with remainders: and such entail and remainders may be barred by fine and recovery, and therefore cannot be considered as a mere right only, but such an estate whereof there may be a seisin." And again, "The interest in the land must be somewhere. It cannot be in abeyance. But it is not in the mortgagee, and therefore must remain in the mortgagor." In that case, Lord *Hardwicke* went on the same principle which influenced Your Honour's decision in Lord *Grenville v. Blythe*; and again, in *Hopkins v. Hopkins* (b), he makes the most clear distinction between the cases of trust and mortgage, confining his observations entirely to the former. So the cases on the subject of acquiring adverse possession by wrong are entirely referable to the case, where, from the beginning to the end, the title must always be considered as between trustee and *cestui que trust*, and no lapse of time will protect the trustee's possession.

With regard to the particular situation of Sir *Lawrence Palk* and his representatives, it is a decided prin-

(a) 1 Atk. 605.

(b) 1 Atk. 591. 1 Ves. 268.
Ca. t. Talb. 44.

ciple of Equity, that, if a man stands by, and sees another acting in respect to an estate under the title of a third person, in the confidence that it is a good title, the Court will preclude the person who so stands by, knowing the confidence in which the party is acting, and not advertising him, but watching his opportunity to take advantage of his acts, from interfering to gain that advantage. So, where a party attends a meeting of creditors, suffers a composition to be made by others, and afterwards objects, a Court of Equity will not allow him to avail himself of that objection, but says, you have encouraged others to enter into this composition, and are, yourself, bound by it. Here, nobody will say that Sir *Lawrence Palk* would have lent his money without the confirmation by *Horace Lord Orford*; and, if that be the case, whatever otherwise might have been the equity of *Lord Orford* or his representatives, they can have none whatever under the present circumstances.

1817.

**CHOLMONDE-
 LEY**
 v.
**CLINTON
 and Others.**

Horne.

I. The object of the deed of 1781 was to change the course of inheritance from that which it would have taken under the deed to lead the uses of the recovery, and to bring it back to the old line of inheritance in the family of the *Rollet*. This was wholly unnecessary, with respect either to the grantor or to his issue. They would take in the same way under each of the deeds. Then, at what period was it intended that the change should take place? At the only period at which a change could be material—at the time of the failure of *Lord Orford's* issue.

The consideration of “natural love and affection” could not refer to the grantor himself; neither could it refer to his issue; both because the objects of it are

1817.

CHOLMONDE-
LEY

v.

CLINTON
and Others.


described as the grantor's relations "of the blood of the "*Rolles*," and because his issue would take equally, whether he had or had not executed the deed in question.

We are not, therefore, obliged to have recourse to any loose conjecture to establish our construction. I grant that the limitation, in the manner that we contend for it, can only take effect by way of contingent remainder. I also admit the preference which is attributed, in the contemplation of law, to vested over contingent remainders, when it is possible that the intention can be carried into effect in conformity to such preference. But that rule is not to operate so as to exclude an ascertained object of the grantor's intention.

This is not a limitation to the heirs of the grantor, but to the heirs of another person, the grantor himself happening to be the heir of that person. There is no limitation to the ancestor. If there were, I admit that it would be impossible to construe the words in any sense but such as would give an estate to the ancestor. But this is a limitation which describes as much the person to take as it denotes the quality of estate to be taken: it therefore becomes necessary to see who was the person intended; and, for that, the Court must look at the whole deed, and all its parts. In that view, the recital becomes important, not so as to prevail if at variance with the operative part of the instrument, but as it tends to explain that which is doubtful, viz. who was the person intended.

II. *Horace Earl of Orford*, being of full age, perfectly cognizant of his rights, of the line of inheritance, and of the pedigree, sees *Lord Clinton* enter, under the deed of 1781, and suffers it without a contest, although himself

the only person who could contest it. There is no possible mode of reconciling Lord *Orford's* right and Lord *Clinton's* possession: they were perfectly adverse. Lord *Clinton*, being thus possessed, makes a new settlement, conveying the entirety of the estate to trustees, for the purpose of raising £34,000 (and, in certain events, £10,000 more,) by sale or mortgage, and, subject thereto, for his family, in such a manner as the absolute owner of an estate would settle it. The estate of the trustees was, therefore, likewise wholly inconsistent with any title that could ever be asserted by *Horace Earl of Orford*. Then followed the application said to have been made by Lord *Clinton* to Lord *Orford*, to confirm his estate; but this is not accurately stated, and the difference is material. If it had been so, there might have been some plausibility, although little of sound reason or honesty, in saying Lord *Orford* meant to give only a qualified confirmation to remove a certain doubt which had been suggested to him, but reserved to himself the benefit of all doubts which might exist beyond it. But this is not a confirmation, it is an absolute conveyance, and, in the form of an absolute conveyance, not to Lord *Clinton*, but to those persons on whom Lord *Clinton* had settled the estate. The recital of the deed must be taken as Lord *Orford's* own statement; and that recital says, that Lord *Clinton* had not only entered as heir *ex parte maternâ*, but had executed the settlement in his right as owner of the estate: the deed then goes on to convey to the trustees of that settlement. The persons who lent their money on the faith of the deed are in the same situation as if they were actual parties to it, since they take under those who are parties, and through the intents and purposes of the deed. Lord *Clinton* says, "I want to raise money on the estate. There is a doubt whether persons will lend me money unless this difficulty, which I have mentioned, be cleared away,

1817.

 CHOLMONDE-
 LEY.
 v.
 CLINTON
 and Others.

1817.


CHOLMONDE-
LEY
v.
CLINTON
and Others.

“ and for this purpose I call upon you, Lord *Orford*, “ to remove it.” Lord *Orford* sees, therefore, that he is called upon for the express purpose of enabling Lord *Clinton* to raise money on the estate; and shall his representatives, more than twenty years after, be admitted to say, “ Lord *Orford* enabled Lord *Clinton*, by his “ confirmation, to take in these mortgagees and pur- “ chasers; and we will now maintain that that confir- “ mation goes for nothing?”

The case may be very different, as between Lord *Orford* and Lord *Clinton*, and as between Lord *Orford* and the mortgagees. Lord *Orford* and Lord *Clinton* each knew the imperfection of his own title; but how can the mortgagees be affected with notice? The recital is, that Lord *Clinton* entered “ as heir *ex parte maternâ*.” Was it incumbent on the mortgagees to enquire if that assertion was true, it being the assertion of Lord *Orford* himself, the heir *ex parte maternâ*? Could Lord *Orford*, or can those who claim under him, be now admitted to contradict that assertion? Is it competent for a person who has confirmed the estate of another, to say to one who has lent money upon the faith of his confirmation, “ You are to give no credit to “ the recitals of this deed. You have lent your money “ upon a bad title, and I will now take your security “ from you?”

Now, granting that the intention cannot control the legal effect of the deed of 1781, still, if it was an intention, clear in itself, and known to the persons who were parties to the deed of 1794, it is that upon which those parties must reasonably be presumed to have acted. The deed of 1794 recites that intention. Why?—unless the parties to that deed meant to abide by it? After Earl *Horace* had seen Lord *Clinton* enter, and hold pos-

session, and exercise acts of ownership—after all this, he executes a deed, in which he says, he knows it was Earl *George's* intention not to vary the deed of 1781. To say that this assertion refers only to a limited object, is to say that Earl *Horace* meant something contrary to good faith. To say that the concluding words of the limitation qualify the terms of it, is to argue on the mere force of particular words against the express intention of the parties. It is a confirmation to the trustees (not a word about Lord *Clinton*) to the uses, &c. of the settlement, and to no other uses, &c. whatsoever, “in the same manner as if the deed of 1785 had “not been made;” which words, if read in a parenthesis, are mere surplusage, and to do otherwise, would be to give them a meaning contrary to the manifest intention of every other part of the instrument.

1817.

 CHOLMONDE-
 LEY
 v.
 CLINTON
 and Others.

III. It is true that, according to the technical rules of law, there can be neither seisin nor disseisin of an equitable estate; but to say that there can be no adverse possession is a most extraordinary position with respect to titles which are equitable merely because the legal estate is outstanding. A mortgagee is considered in a Court of Equity, not as a person entitled to possession, but as a creditor having a claim subject to which the equity of redemption is to be considered as an estate to be dealt with, to all intents as if there had been no mortgage whatever. This was not a mortgage created by *George Earl of Orford*—Nobody contests his title. But the contest is between two persons claiming the equity of redemption subject to that mortgage; and there is no distinction between this and the case of any other outstanding estate. The statute of limitations is strictly pleadable in this Court; and if at the distance of more than twenty years they can say it is to go for nothing, they may as well say so at the end of five hundred years.

1817

CHOLMONDE-
LEY
v.
CLINTON
and Others.


The question depends upon that which the Court has in innumerable instances recognised as an objection; a party coming to assert a stale equity against one to whom no fraud can be imputed, after a great lapse of time, and after repeated acts of confirmation and acquiescence.

Longley,

After again adverting to the point of *Champerty*, and insisting that the bill must be considered as dismissed with regard to the Marquis *Cholmondeley*, submitted a defect of evidence in respect of the will of *Samuel Rolle* not being sufficiently established before the Court, and the recital of the deed of 1781 not being admissible to prove the actual situation of the parties at the time when that deed was executed. He remarked on the date of the deed of 1781, almost immediately following that of the death of *Margaret Countess of Orford*, as a circumstance strongly corroborative of the intention of *Earl George* in favour of the *Rolle* family. In addition to the authorities already referred to on the subject of rules for the construction of deeds, he mentioned the judgment of Lord C. J. *Willes*, in *Roe dem. Wilkinson v. Tranmer* (a); and, with respect to the office of the *Habendum*, what is said in *Shepherd's Touchstone*, p. 101., that "the *Habendum* shall be taken most strongly " against the grantor, and most to the advantage of the " grantee, yet so as withal it shall be construed as near " the intent of the parties as may be." With regard to the suggestion of *Roupell*, that it might be doubted whether the deed of 1785 did not operate as a revocation of that of 1781, as the point was not raised by the bill, it was not necessary to advert to it; but the cases of

(a) *Willes*, 684. See *Sugd. Gilb. on Uses*, 243. 3d ed.

Perkins v. Walker (a), *Thorne v. Thorne* (b), and *James v. Jackson* (c), would furnish a sufficient answer. He dwelt on the whole structure of the deed of 1794, as amounting to an absolute conveyance; and insisted that the only restrictive words "and to and for no other use, intent, or purpose whatsoever," must be necessarily referred to the "uses, trusts, intents, and purposes of the deed of 1792," the only construction which could be applied to them according to the ordinary usage of conveyances. Then the words which follow were merely declaratory of an objection which had been started, and which it was intended to remove, but were by no means to be taken as limiting the operation of the deed to that single purpose. On the point of length of time, the cases of rents which had been cited (*Stackhouse v. Barnston, &c.*) rested on grounds peculiar to those cases, and were not to be considered as decisive of the general question. On the head of acquiescence, the case of *Lord Pomfret v. Lord Windsor* did not apply, being a question between equitable incumbrances, not on the part of those claiming the equity of redemption, which is the *corpus* of the estate itself, and capable of a distinct and substantive possession. *Lord Grenville v. Blyth* proceeded expressly on the ground that there may be an adverse possession of an equity of redemption.

1817.

 CHOLMONDE-
 LEY
 v.
 CLINTON
 and Others.

Leach in reply.

I. The first,—and by far the most important point in this case,—depends upon the deed of Settlement of 1781; which has been supposed, by a common mistake, from the death of Lord *Orford* till the late discovery, to give title to the Defendant Lord *Clinton*. It is not denied that Lord *Clinton* can have no title under that deed, if the words are to be received according to their legal

(a) 1 Vern. 97.

(c) 16 Ves. 356.

(b) *Ibid.* 141.

1817.


CHOLMONDE-
LEY
v.
CLINTON
and Others.

effect. It is a settled rule of policy in the law, that no person can make his own right heir a purchaser; and, as he cannot do it by direct, neither can he by indirect, description. He cannot, for instance, make his right heir a purchaser by calling him in a deed not his own right heir, but the right heir of his father.

But then it is said, "Although that may be very true in a common law conveyance, it is not true in the construction of wills. This is a conveyance operating by the statute of uses; and a conveyance operating by the statute of uses is subject to the same rules of construction as apply to wills."

Is this an accurate statement of what the rule of law is at this day? Is it true, that the rule of construction which applies to wills, applies to conveyances by the statute of uses? Or is it not a strict rule in Courts of Law, that the same construction that applies to common law conveyances, applies to conveyances under the statute of uses, with one exception only? Why should it not be so in principle? If we were now inquiring, not what is the strict rule, but what ought to be the rule, how would the Court address itself to the consideration of the subject? The policy of the common law requires, that it should be understood, that he who uses certain technical expressions in a deed, means what those expressions import. It is a rule founded with a view to the security of property. That rule is not applied to wills, because wills are often necessarily made without deliberation, and without an opportunity of legal assistance; and the Court, therefore, if it were to apply that rule to the case of wills, would be likely, in a great number of cases, to defeat the intention of the testator. But a conveyance to uses stands on the same footing, in this respect, as a common law convey-

ance. It cannot be said, if there is any sense in the reason of the rule as to common law conveyances, that it is not applicable equally to a conveyance under the statute of uses. We are not enquiring, however, how the law ought to be settled.—The law is settled.

1817.

 CHOLMONDE-
 LEY
 v.
 CLINTON
 and Others.

The first case to which I shall refer, is *Abraham v. Twigg* (a). If that had been a common law conveyance, the words "heirs male" would of necessity have given a fee-simple to *Gabriel Dormer*. The question was, whether it did not also give a fee-simple to *Gabriel Dormer* in a conveyance to uses, or whether it was to receive the construction of a will? The Justices held, that it was an estate in fee to *Gabriel Dormer*; that although it were by way of use, it differed not from other gifts by deed, and should not have any other construction. So in *Makepeace v. Fletcher* (b), which was a limitation by a man to the use of his eldest daughter and the issue of her body. In a will, that would have been a clear estate tail. In a common law conveyance it would not have been an estate tail, because there wanted the word "heir." All the Court agreed that the daughter had not an estate tail, but an estate for life only; that is to say, that it was impossible to construe the deed on the principles that apply to wills, and that, according to the effect of common law conveyances, she could have an estate for life only. So in 1 *Roll. Ab.* 837: *R.* 1., "If a man makes a feoffment "to the use of *J. S.* and the issue male of his body, "this is no estate tail for want of the word heir, "although this be by the way of use;" in other words, conveyance to uses must receive the same construction as common law conveyances.

(a) *Cro. Eliz.* 478.

(b) *Comyn*, 457.

1817.

CHOLMONDE-
LEY
v.
CLINTON
and Others.

The case of *Tapner v. Merlott (a)*, was not decided on the point in question. But Lord Chief Justice *Willes* thought it important to state his opinion, which was also that of the other Judges; and this is his language: "As to what was insisted upon, that a conveyance to uses is to be construed as a will, and in a different manner from other conveyances, we are all clearly of a contrary opinion; for, since the statute of uses, an use is turned into a legal estate to all intents and purposes. It must be conveyed exactly in the same manner, and by the same words; and, if it were otherwise, as most conveyances are now made by the way of use, endless confusion would ensue."


In *Doe v. Morgan (b)*, Lord *Kenyon*, after deprecating all arguments addressed to the passions in Courts of Justice, states his opinion, (as to which there may be some ground to differ from him,) that "it would have been better for the public if the same rules of construction, which hold in the cases of deeds, had always been applied to wills." And afterwards goes on to say, (referring, probably, to the very case that has been cited from *Cro. Eliz.*) "Soon after the statute of uses, an attempt was made to introduce a different construction on deeds to uses, from that which was put upon common law conveyances; but that attempt failed of success, and the same rule of construction applies to both." Lord *Kenyon* was afterwards called to reconsider this subject in *Alpass v. Watkins (c)*, where the attempt was to alter the effect of a limitation upon the supposed intention of the author of the deed, inferred from an expression in the recital. It was argued that, being a conveyance operating under the statute of uses, the technical words, giving an estate tail, should not

(a) *Willes*, 180.

(c) 8 T. R. 516.

(b) 3 T. R. 765.

have their technical construction. But the question was treated as so little deserving of attention by the Court, that Lord *Kenyon* would not hear the Counsel argue in support of the estate tail, but said, this is the case of a deed, a deed to uses, which must be construed like a common law conveyance.

1817.

 CHOLMONDE-
 LEY
 v.
 CLINTON
 and Others.

I stated this to be the strict rule "with one exception;" by which I meant to refer to the opinion of Lord *Hardwicke*, and his decision in *Rigden v. Val-lier* (a). There the deed clearly had a testamentary purpose, for it was a general disposition of the whole real and personal estate; and one of the arguments used by Lord *Hardwicke* for coming to the conclusion that the words "equally to be divided between them," would give a tenancy in common, was, that the deed was testamentary. I do not mean that this was a reason to support his judgment; it has not been so considered. It stands as an exception to the general rule. It stands on his great authority more than on the reason of the thing; and it has ever been regretted by the Judges, that by the force of authority such a construction should have crept in as a solecism. Lord *Hardwicke* does not dispute the general rule, that these conveyances are to be construed like common law conveyances; but he says, the words are "words of regulation or modification," not affecting the substance of the limitation; and, *therefore*, "there is no harm in giving them greater latitude in deeds on the statute of uses, than on feoffments."—It seems, therefore, that he adopts and confirms the rule; and one cannot but lament that he has founded an exception on such unsatisfactory reasoning. The question was afterwards pressed on.

(a) 3 Atk. 731. 2 Ves. 252. 257.

1817.

CHOLMONDE-
LEY
v.
CLINTON
and Others.


Lord *Thurlow* in another case, which has been cited (*a*), where the question was raised on a settlement, "to permit "all and every the children to take the rents to them "and their heirs for ever," whether the children were to take as joint heirs, or as tenants in common. It was said, "here is as plain an intention as there was "in *Rigden v. Vallier*." I have seen a MS. note of Lord *Thurlow*'s judgment in this case, in which he alludes to *Rigden v. Vallier*, and regrets the decision. But to take the effect of his judgment, as it appears in the report: "The question," he says, "is, whether "the giving the estate this way can be supported, and "whether deeds to uses, in the nature of wills, should "be construed so widely as wills have been. I should "be sorry to give into this, for I think no good has "been done by the wide construction of wills." Upon the cause coming on again, he observed, that, "whether the settlement was to be considered as the conveyance of a legal estate, or a deed to uses, would "make no difference;" and he adhered to his former opinion.

The Court will not be surprised to find that some authorities (as they are termed) are cited by the Defendants in support of their proposition, that conveyances to uses are to be construed as wills; since Lord *Kenyon* tells us, that an attempt had been made, soon after the statute of uses, to introduce that distinction. The first of these attempts is to be found in the case of *Leigh v. Bracc* (*b*), and undoubtedly *Carthew*, the reporter, distinctly states, that the decision in that case was supported upon the principle that there was no distinction in construction between conveyances to uses

(*a*) *Stratton v. Best*, 2 Bro. C. C. 233.

(*b*) *Carth.* 343. 5 Mod. 266.

and wills. Now, that case was pressed upon the attention of the Court of *Common Pleas* in *Tapner v. Merlott* (a), and I should have thought that it would hardly have been considered as useful to the Defendants, after having read what L. C. J. *Willes* said on this subject, to bring forward that case as entitled to the least weight. For there, after the passage I have already referred to, His Lordship proceeds to comment at large on that very case, and concludes thus—"I own that *Carthew* is, in general, a very good and a very faithful reporter; but I fancy he was mistaken here, because I cannot think the Court would give so absurd a reason for their judgment, especially since there is not a word said of it in *5 Mod.*, where the case and the arguments upon it are very particularly reported. However, if this had been as *Carthew* reports it, yet it is a single case, it is contrary to reason and to common experience, and such a determination would make such confusion in all the property of the people of this kingdom, that I own I should have no regard to it, but think that the contrary ought to be declared to be law."

1817.

 CHOLMONDE-
 LEY
 v.
 CLINTON
 and Others.

The next case relied upon, is not a decision, but a *Dictum*; the *Dictum* of Lord Chief Justice *Hale*, in *Pybus v. Mitford* (b). Now in that case, there was no such point decided: the point had no application to the question before the Court; but Lord *Hale* enters into an argument, and gives his opinion that the second son might take by description as a purchaser, proceeding upon the distinction, which he considers there ought to be made, between the construction of a conveyance to uses, and that of a common law conveyance. Undoubtedly,

(a) *Willes*, 177.

(b) *Vent.* 372.

1817.

CHOLMONDE-
LEY

v.

CLINTON
and Others.


therefore, there is Lord *Hale's* opinion upon this subject; one of those opinions to which Lord *Kenyon* refers. Mr. *Hargrave*, in a note to *Coke Littleton*, enters very much into the consideration of this opinion, and says, the tradition of the profession is, that Lord *Hale* in that *obiter dictum* stood alone; though it would appear from the report in *Ventris*, that Mr. Justice *Wylde* adopted the same notion. However, it was "an attempt made," a floating notion, which, happily for the interests of society, is now settled to a different conclusion.

The case of *Wills v. Palmer* (a) is also entitled to great weight, though not a decision, yet as an authority of the Court. In that case, the Court was not called on to consider whether, if the father had not taken an estate tail, he would have taken by purchase. That was quite immaterial; for, having decided that he was to take by descent, it was immaterial to enter into the other question. They do, however, proceed to state their opinion upon it. But giving to their *dictum* all the weight which the character of the Judges entitles it to, still it is a mere *dictum*; and we cannot but consider it, when compared with those decided authorities which have been stated in support of the Plaintiff's case, as one of those "attempts" which were made (as Lord *Kenyon* says) to adapt the principle of the construction of wills to the case of conveyances to uses.

Mr. *Preston* cited the case of *Spark v. Spark*, and seemed to consider it the most important case in the books. But if it had not been qualified by so strong an epithet, it would never have occurred to me as a case to which it was at all important to call the attention of the Court.

(a) 5 Burr. 2616.

The question being whether a term of forty years, vested in the lessee for eighty years, under the description "to his executors," the Court says, that it clearly vested in him upon the plain declaration. Nobody can doubt that it must have been the intention that it should vest in him. A stranger gives to *W. S.* a lease for eighty years. A stranger gives to his executors a further lease for forty years. How could that stranger have intended any personal benefit to those executors? What motive could operate with the grantor of that estate to make this beneficial provision for the executors of *W. S.* when he could not possibly know who they would be? This, therefore, was held substantially a grant to *W. S.*

1817.

 CHOLMONDE-
 LEY
 v.
 CLINTON
 and Others.

Then, as to Archbishop *Cranmer's* case (*a*), which Mr. *Preston* thinks could not have been decided as it was, but on the distinction between a deed to uses and a common law deed.—Suppose Archbishop *Cranmer* had limited to a stranger, and afterwards to his executors, must not the decision have been the same as in *Spark v. Spark*? Suppose, in *Spark v. Spark*, it had been a lease made by *W. S.* to himself, remainder to his executors, must not the decision have been the same as in Archbishop *Cranmer's* case? Then how can it be said this is a case to establish a distinction?

In the note to that case, which has been also referred to, it is not said by *Walmesley* that the decision turns on the distinction between deeds to uses and common law conveyances; he states that it is limited to uses, but he does not notice the distinction: the decision was on the intention: in the one case, a man might well give to his own executors, but a stranger would not give to persons not within his appointment or knowledge.


(a) Salk. 508.

1817.

CHOLMONDE-
LEY
v.
CLINTON
and Others.

Suppose, however, this was not the settled law of the Court, and that, from any (as I should think) mistaken, loose, and imperfect view of the subject, the Court had been induced to apply the principle of construction in the case of wills to the case of a conveyance to uses, let us enquire what, upon this subject, has been decided in the cases of wills? It has been decided that, in the case of a will, a son, though the father be alive, may take as purchaser by the description of "*heir*." In *Long v. Beaumont* it was decided, that the word "*heir*" in a will may receive the construction "*of heir apparent*." It was decided by *Brown v. Barkham*, and other cases of that class, that an heir special may take, though he be not the heir general; that a man may take as heir by purchase, though not heir to all purposes. Suppose the same were to be held in a conveyance to uses, what has that to do with the present question? Here it is admitted that Lord Orford meant the right heir of *Samuel Rolle*. A will speaks at the death of the testator; but a deed speaks presently, and marks the intention at the time of its execution. A man may by deed describe a future class of persons as heirs to come into existence; but here he uses no terms of futurity, he speaks *per verba de præsenti*; he speaks of persons already in existence, of the *then* "*right heirs of Samuel Rolle*." But we are told to look at the prior part of the deed, and that there we shall collect that he did not mean what he has said; that he meant something in direct contradiction to the plain force of his own expression. I am quite willing to admit that he never meant to describe himself under the term of "*right heir of Samuel Rolle*:" it could not be that he meant to describe himself. I am certain that he made some mistake, either in point of law or of fact; that he misunderstood either the effect of the terms he used, or his own individual character; that he did not mean what the expression

imports. But is there any such rule as that, if a testator, by mistake, makes a deed directly contrary to his intention, the Court shall say, it will make a new deed for him according to his intention? Not a case has been produced, where, in a clear mistake, the Court has ventured to say it will not act upon the deed made, but it will act upon a deed not made. Why are we left without one principle or authority to guide the Court in its decision on the single point presented to it? For no other reason than because there is no principle or authority to meet it.

1817.

 CHOLMONDE-
 LEY
 v.
 CLINTON
 and Others.

I am willing, however, that the case should stand upon the rules of construction so elaborately pressed upon the Court. Let us see what these rules of construction are. They are those laid down by L. C. J. *Willes*, in the case of *Dormer v. Parkhurst* (a), where the learned Judge thus concludes: "I admit that, though the intent of
 " the parties be never so clear, it cannot take place con-
 " trary to the rules of law, nor can we put words in a
 " deed which are not there, nor put a construction on
 " the words of a deed directly contrary to the plain
 " sense of them."—"But where the intent is plain and
 " manifest, and the words doubtful and obscure, it is
 " the duty of the Judges (and this is that *astutia* which
 " is so much commended by Lord *Hobart*, page 227, in
 " the case of the Earl of *Clanrickard*,) to endeavour to
 " find out such a meaning in the words as will best an-
 " swer the intention of the parties."

To apply those rules to this case,—Is the Court here called upon in the case of doubtful words? The Court is asked to strike out words which exist, and to introduce such others as will best answer the intent of the parties.

(a) *Willes*, 332.

1817.

CHOLMONDE-

LEY

v.

CLINTON
and Others.

But this is not the office of construction; it is a case of plain mistake on the part of the grantor, and the Court cannot relieve against mistake in a voluntary settlement. Suppose it could correct a plain mistake on the part of the author of the deed, and say that the deed shall mean something directly contrary to what he has said, still the Court cannot safely find its way, unless it can see what is the single and precise expression that would have met his intention. Has Lord *Orford* told the Court what was the future period at which his description of "right heir" was to apply? They say, he has told it in the recital; that the motive of the deed clearly points out who it was that Lord *Orford* meant. Suppose we were to introduce into the deed,—“to the use of such person as shall at my death be the right heir of *Samuel Rolle*,”—is that an expression that would satisfy the declared purpose of the author of this deed? “In making the limitation of this deed, out of love and affection to my relations, the heirs of *Samuel Rolle*, I desire, in case I should have no heir of my body, that such person as shall, at the time of my death, answer the description of right heir of *Samuel Rolle* shall succeed to this estate.” Can it be said that this would not have satisfied the expressed intention at least as well as the words which are sought to be introduced, limiting the period to the failure of issue? Then the Court has here a choice of two expressions, either of which would equally satisfy the expressed intention. Which of the two is it to adopt, in the absolute uncertainty in which the author of the deed has left it? If the Court were to find, in an express deed, something which imported one of two objects, with so much uncertainty that it was not possible the Court could make a choice between them, the deed would be decreed void for that uncertainty. Then if the Court sees that either of these expressions would answer the intention,

is it not placed in the same situation? But there may be another uncertainty. After the limitation to the use of the heirs of the body of *George Lord Orford*, there is a use "to such person or persons as he shall appoint." Now, why might not *George Lord Orford* have executed every purpose of the deed, if he had said, "remainder" to the use of such person as shall be the right heir of "*Samuel Rolle*, when the use which I propose to execute by virtue of this reserved power shall fail?" Would not that equally answer the intention of the grantor? Does not the Court here meet with a choice of three expressions, describing totally different persons, and yet each of those descriptions answering the motive and purpose of the testator?

1817.

Charles Dorr
Esq
 v.
Clinton
 and Others.

II. The Deed of Confirmation is then relied on as giving a title to Lord *Clinton*, supposing he had no title under the deed of 1781; and the arguments are shaped in different forms. In the first place it has been stated, that this deed of 1794 is a plain confirmation on the part of *Horace Lord Orford*, not to the extent only of removing out of the way the alleged difficulty of the deed of 1785, but that there is a plain intention to confirm Lord *Clinton's* estate absolutely under the deed of 1781. But I need only refer to the deed in question to satisfy the Court that the simple object was not to touch the deed of 1781; not to confirm any defect in that deed; but to remove the obstructions created by the deed of 1785.

They then say, This is a confirmation, not of Lord *Clinton's* estate, but of the estate of the trustees of the deed of 1792. We say the same. It was reasonable it should be so. Lord *Clinton* having assigned to trustees for certain purposes, the confirmation was to enure for those purposes. But it is a confirmation of

1817.

CHOLMONDE-
LEY
v.
CLINTON
and Others.

the estate of the trustees in the same respect as it would have been a confirmation to Lord *Clinton* himself. There is no prayer against the trustees ; but, if there were, they accepted the trust, not in respect of this deed of confirmation, but in the confidence that Lord *Clinton* had the title under the deed of 1781. If the confirmation had never existed, would not the trustees have been reduced to the very inconvenience which they now complain of as a hardship peculiar to them ?

Then it is said, Suppose it was the intention of *Horace* Lord *Orford* not to confirm altogether, but simply to remove the deed of 1785 out of the way, still there is here an actual confirmation to all intents and purposes. They say that, by the rules of law, if I confirm to a man an estate for a single hour, that confirmation enures to his whole estate. And I agree that, if the person to whom I convey for an hour has an estate in fee, my confirmation, though expressed for an hour only, is a confirmation of the whole fee. If I acknowledge a good title in a man for a minute, the policy of the law excludes me from ever afterwards asserting a title against him. But, suppose there be an estate for life, with remainder over, do they pretend that, if I confirm his estate to the lessee for life, that will enure to the remainder over ? I cannot confirm as to a particular estate partially, but, if the fee be divided into several estates, I may confirm one without confirming the others. If there is a lease for one hundred years, I may confirm for one year of that lease, because there the feudal principles do not apply. *A.*, *B.*, and *C.* hold in fee : I confirm as to the estate of *A.* only. That will enure as a confirmation of that estate only, and not as a confirmation of the whole estate. Then upon what principle is this to be a confirmation to all intents and purposes ? It is a confirmation against the effect of a

particular deed; and upon what principle does it stand that there may not be such a limited confirmation?

1817.

CHOLMONDE-
LEY
v.
CLINTON
and Others.

Another ground taken is, Whatever you meant, this is not a confirmation: it is a conveyance by lease and release; and the operation of that is to pass the whole estate. Whatever, therefore, you intended, you have passed the whole estate to Lord *Clinton* by legal conveyance. Now, if this were at all important, I should state with great confidence, that the effect of a deed of lease and release, whether considered strictly as such, or as a covenant to stand seised to uses, or as a bargain and sale, or as a confirmation, is like every deed operating by the statute of uses:—that it will receive a construction according to the intent of it; and that deeds of lease and release will become deeds of confirmation, when it is necessary that they should be so. But there is not the least need of entering into these questions, for we are not dealing with a legal estate. This is a transaction with respect to an equity; and the single question is, What was the true intention of the parties?

There is yet another argument which has been used on the part of the Defendants. They assume, first, that this was a conveyance of the whole fee by lease and release; then they say, your bill is to be considered in effect as a bill calling on the Court to reform this conveyance; and you are not in a situation to call on the Court so to do, because you were acquainted with the facts, although it is true you were ignorant of the law. Is that the rule of a Court of Equity? If a man represents to me, that under a particular will or deed he is entitled to an estate, and I, in confidence of that representation, and in ignorance of my legal right under that instrument, execute a deed to confirm his title, is

1817.

CHOLMONDE-

LEY

v.

CLINTON
and Others.

it the law of a Court of Equity that I am not entitled to relief against such a mistake?


The first case is *Lansdown v. Lansdown (a)*, where the Chancellor said, "that the maxim of law, *ignorantia juris non excusat*, was in regard to the public, that "ignorance cannot be pleaded in excuse of crimes, but "did not hold in civil cases." The first brother had no more conception that the schoolmaster's law was wrong than the other had. The one considering that he was entitled, and the other considering the same, the youngest brother got an advantage. The elder insisted, notwithstanding the schoolmaster's law, that he was entitled; and this case might be considered as a compromise of a disputed right, and might have prevailed on that ground. That ground did not prevail, because it was considered that the parties acted in mistake of the law; and therefore deeds so executed could not be sustained in a Court of Equity. A stronger case cannot well be stated. On a mere mistake between two parties, one is permitted to enjoy, and the other renounces; and the Court will relieve against the effect of that mistake.

The next case is *Bingham v. Bingham (b)*: this was a case of gross ignorance of the law. It turned out that the Plaintiff had bought his own estate, and that the Defendant had no claim to it. On this ground the bill was filed. It was insisted that it was the Plaintiff's own fault, to whom the title was produced, and who had time to consider it. Here, therefore, the Plaintiff was fully apprised of the instrument which created his title: he had an opportunity of considering the effect of it, and of taking legal advice; but, notwithstanding he had that

(a) Mosel. 364.

(b) 1 Ves. 126.

opportunity, as he dealt under a mistake of his own right, the Court decreed for the Plaintiff, with costs, and interest for the money from the time of bringing the bill.

1817.

 CHOLMONDELEY
 LEX
 V.
 CLINTON
 and Others.

So in *Turner v. Turner (a)*, the Court was of opinion the Plaintiff ought to be relieved, and had an undoubted right to the mortgaged premises; and decreed the Defendant to repay all the money received by him thereon to the Plaintiff; and this was not upon any misrepresentation, not upon any fraud, but upon a mutual mistake as to the title. And in *Pusey v. Desbouverie (b)*, the Court held, because the daughter was ignorant of the amount of the orphanage share, though there was no fraud, that it was ignorance, whether of law or of fact, against which the Court would protect; and relief was given accordingly.

Another objection is, will a Court of Equity relieve you against this deed, which was executed by mistake, in order that you may take advantage of a mistake made by your ancestor in an instrument by which he meant to disinherit you? I own this argument had a novelty in it which a good deal surprised me. I never before heard it stated that, if an heir at law comes for relief in his character of heir at law, there needs to be any enquiry whether he became entitled because his ancestor made no will or deed, or because, having made a will or deed, it was defective. We take the deed as we find it: the intention was to remove the instrument of 1785 out of the way of the settlement of 1781, and the deed executes that intention only.

Then it is asserted, that, if Earl *Horace* had really known there was a defect in the deed of 1781, he would

(a) 2 Cha. Rep. 81.

(b) 3 P. W. 321.

1817.

CHOLMONDE-
LEY

v.


CLINTON
and Others.

have also remedied that defect. My answer is, The Court is called on to consider, not what Earl *Horace* would have done, or might have done, but what he has done. But is the Court prepared to say, that if Earl *Horace* had been called on to give this estate to Lord *Clinton*, in respect of the imperfect effect of the deed of 1781, he would have done so? The evidence before the Court is, that Earl *Horace*, knowing he could take no advantage of the deed of 1785, agreed to remove it. And the Court is seriously told, because he executed a deed by which he gave nothing, that, if he had known that he had £20,000 a-year to give away, he would have given it.

III. Upon the length of time, there cannot be any difference of opinion as to the general principle. The same possession, which would be a bar at law, will form an objection in the case of an equitable estate. It would be strange if it were otherwise. Suppose the Court is called to consider questions not arising out of the form of the conveyance,—questions in which the jurisdiction does not depend on its being a legal or an equitable estate, —but questions in respect of the Court's special jurisdiction. What is the rule adopted in such cases? A Court of Equity, proceeding by analogy to those statutes which protect possession at law, adopts and applies them; and, as twenty years at law is a bar to a possessory action, so it is held a bar to equitable relief.

But they say, This is substantially the suit of Mrs. *Damer*.—She has been out of the possession twenty years, which would have barred her from proceeding by ejectment, and therefore she is entitled to no relief in this Court. But, if Mrs. *Damer* is the person entitled, there is an end of the objection. She would be entitled to her ejectment as Devisee, because her Testator died seised

only in 1797, fifteen years before the bill filed. It is for them to make out the analogy between law and equity. It is for them to make out an adverse possession against the Plaintiffs. They have no adverse possession in equity; have they an adverse possession at law? Have they an adverse possession against the mortgagee?—(for we are now treating the case on an acknowledged title in the Plaintiffs to this equity of redemption.) Am I stating a new doctrine when I say, The possession of the mortgagee is the possession of the mortgagor?—That the possession of him who so holds my estate is the possession of me who have granted it?

1817.

 CHOLMONDE-
 LEY
 v.
 CLINTON
 and Others.

They say, the mortgagee never was in possession, and I grant that he was never in the actual possession; but he was in possession by the person who claims as mortgagor. Lord *Clinton* says, it is his estate which the mortgagee holds; it is in that character that Lord *Clinton*, as between himself and the mortgagee, stands. Is not he a mere tenant at will to the mortgagee? Could not the mortgagee, at any one hour, by ejectment, have turned Lord *Clinton* out of possession? Is it possible to contend that he had an adverse possession against the mortgagee? Was not the mortgagee in possession of the estate by the hands of Lord *Clinton*? Therefore, as between Lord *Clinton* and the mortgagee, Lord *Clinton* had not a single minute of adverse possession; and if, as between him and the mortgagee, he had no adverse possession, he had no adverse possession as between him and the mortgagor;—for, if the mortgagee is in possession, it is the possession of him to whom he is to return the estate on payment of the money. And yet Lord *Clinton*, not having for a single hour a possession which he could treat as adverse, talks of analogy to a Court of Law, and says, Give me the benefit of the possession. As to what happened in 1811, when he


1817.


CHOLMONDE-
LEY
v.
CLINTON
and Others.

took the assignment of this mortgage, that does not alter the question. But Lord *Clinton* says, It is true, I cannot pretend I have the benefit of a disseisin, but I have what is just the same thing, I have been receiving the rents and profits for twenty years. I have been putting into my pocket what belonged to you—is not that substantially an adverse possession? Allow that, at law, it is not; but is it not in a Court of Equity? It is something new, that there may be a possession not adverse at law but adverse in equity. I could understand the distinction, that they may have a possession adverse at law and not adverse in equity: but this is the converse.

Now, what is the effect of the late decisions on the subject, in *Grenville v. Blythe*, *Hansard v. Hardy*, &c.? That, so long as he who has the legal estate is not disseised, so long as the legal estate is not turned into an adverse right, so long as it is considered in possession, it is nonsense to talk of equitable disseisin. If you mean to acquire an adverse possession at law against me who have an equity, the way is to disseise him who holds the estate for my equity; but, so long as my estate subsists in his possession, it is idle to talk of a possession which is to deprive me of my equitable rights. This is the point decided in those cases, and on the clearest principle; for how can it be contended that, so long as he who holds an estate for me, which he is bound to treat as my estate, is entitled to enter, I lose the benefit to which I am entitled by his entry? I can compel him to enter, so long as he remains entitled to do so; and, if he suffers any other person to take the rents and profits, unless it amounts to a legal ouster, unless his title is gone at law, I can compel him, in a Court of Equity, to assert his legal rights. If, therefore, these cases are law, it is new to say that, though there is no adverse possession at law, yet the wrongful receipt of rents and profits amounts to an adverse possession in equity.

But they say, this is not a bill for redemption—if it is, why make Lord *Clinton* a party? This is again one of those inaccuracies which one is surprised to find very acute and able men fall into—Was it possible to file a bill for redemption without making him a party? He is the person entitled to receive the mortgage money. When I call for a conveyance of the estate to me on payment of the mortgage money, am I not bound to call upon him who is to receive the money? The Defendant *Drake* says, I took an assignment of the mortgage from the heir of Sir *Edward Hughes*, but it was with Lord *Clinton's* money. Was it possible then to do other than make him a party? Suppose somebody else had paid off the mortgage in 1811, and that a bill was filed against that person. Suppose he said, You are the representative of *George Lord Orford*; it is true that you, Lord *Cholmondeley*, or you, Mrs. *Damer*, are entitled to redeem; but I will let you into a secret—For the last twenty years I had a notion that Lord *Clinton* represented *George Lord Orford*, and I allowed him to hold the estate—I received the interest regularly, and was satisfied—It was nothing to me, and therefore I allowed Lord *Clinton*, believing him to be the person entitled, to remain in possession of the estate. Suppose he went on to say, Now I insist, because for twenty years I have permitted Lord *Clinton* to take the rents and profits, that therefore you, the acknowledged representatives of *George Lord Orford*, are not entitled to redeem me.—That is the very case which the Court has now to decide. Suppose the mortgagee had stated such an answer as that to a bill filed for redemption by the present Plaintiffs; would they have found any Counsel to state the case?—To contend that, for that reason, the mortgagee was not bound to return the estate of the mortgagor?—that the representatives of *George Lord Orford* had no right to redeem because the mortgagee had received the interest from Lord *Clinton*, who for twenty


1817.

 CHOLMONDE-
 LEY
 v.
 CLINTON
 and Others.

1817.

 CHOLMONDE-
 LEY
 v.
 CLINTON
 and Others.


years had been in the receipt of the rents and profits? Suppose Lord *Clinton*, he being not interested in the mortgage money, had filed a bill to redeem this mortgage—Suppose he had stated his title to redemption according to the truth—Suppose he had said, Earl *George* made such a deed in 1781; Earl *Horace* made such another deed in 1794, in the persuasion that he was entitled under the deed of 1781; my father entered into the receipt of the rents and profits of this estate in the persuasion that he was entitled under the same deed; he continued in the receipt of the rents and profits; and upon the death of my father, I entered, claiming in his right: I admit all this was by mistake—that my father asserted his title by mistake—that Earl *Horace* submitted by mistake; but, though all this was done by mistake, yet inasmuch as I have wrongfully taken these rents and profits for twenty years, I submit that I have thereby acquired a title to redeem; and I call upon the Court to compel Sir *Edward Hughes* to assign to me on the payment of the mortgage money.—Would any lawyer state such a case? And is not the present that very case? The cases I put, and which appear so extravagant, absolutely depend upon the principle which the Court has now to consider.

Now what is the real form of the proceeding? The Plaintiffs insist that they are entitled to the equity of redemption. The mortgagee has no answer to make. In some cases the answer of a mortgagee is that there is no mortgage. But here, the mortgagee is ready to convey the estate to those who have the equity of redemption. It is admitted that, in point of title, the Plaintiffs have it; but Lord *Clinton* says, “Though you represent *George Lord Orford*, and are entitled to “the equity of redemption, yet I have a better equity “than you. Yours is a perfect equity; but mine is a “better. My father and Earl *Horace* mutually mis-

“ took their rights. My father believed he had a title
 “ to the estate, and asserted his right. Earl *Horace*
 “ believed the same, and lent himself to that claim.
 “ Under this mistake, my father and I have continued
 “ in possession twenty years, and therefore, because we
 “ have been wrongfully receiving the rents under this
 “ possession, we have a better equity than you have.
 “ We have no title at law, but we are entitled in
 “ respect of a wrongful possession for twenty years,
 “ under circumstances that give no title at law. Your
 “ equity is gone by our wrong. This mutual mistake
 “ of our ancestors, this assertion of right on the part of
 “ my father, this acquiescence on the part of your an-
 “ cestor, have enabled me and my father wrongfully
 “ to receive the rents and profits for twenty years and
 “ six months; and this wrongful possession has given
 “ us an equity.” Is not that the real question upon
 the length of time? If a man obtains a wrongful pos-
 session for more than twenty years, proceeding upon
 an assertion of right on his part, and a belief of it on
 the other, and that mistake continues undiscovered for
 a number of years, that very mistake, though it gives no
 title in law, gives, in a Court of Equity, a better title
 than that of the owners.

1817.

 CHOLMONDE-
 LEY
 v.
 CLINTON
 and Others.

But suppose in the year 1791, when *George Lord Orford* died,—*Lord Clinton*, representing to *Earl Horace* that he was entitled to this estate, and *Earl Horace*, in ignorance of his title, believing it,—he, *Lord Clinton*, had, for some reason or other, called on *Earl Horace* to confirm his title. Suppose also that there was no mortgage in question, and that *Earl Horace*, in 1791, had executed a deed upon this representation on the part of *Lord Clinton*; in such a case, both parties would have proceeded in mutual ignorance of the law. If the cases to which I have called the attention of the Court be law, could not these Plaintiffs now file a bill, and call

1817.

 CHOLMONDE-
 LRY
 v.
 CLINTON
 and Others.


on Lord *Clinton*, though he had adverse possession at law, to restore the legal estate? "No," (say they) "on your own principles, this would be a case merely equitable; a case proceeding on no analogy of law, "but on the peculiar jurisdiction of this Court; and "therefore twenty years would bar your right." Do they then forget the language of the cases on this subject? In these equitable cases, time runs when the mistake ceases. The twenty years, in equitable cases, begin, when the fraud, the mistake, the ignorance which induced the conveyance, ends. When you tell me, therefore, it is twenty years and six months since you entered into my property, do you say, it is twenty years since I discovered it? The answer is, No: that I do not tell you; but you are bound to make out the fact of its being a recent discovery. How can I prove a negative? If you mean to protect a possession derived under misrepresentation and wrong, you must prove that I knew it. How can I prove that I did not know it? But the deed of 1794 does negatively shew, that, in the year 1794, Earl *Horace* was acting under the same delusion that induced him to submit to the possession of Lord *Clinton* in 1791. And Lord *Redesdale* states it as a clear principle, that a limitation runs, not from the time of possession, but from the time of the discovery of the fraud or mistake which produced that possession.

IV. I now come to the only remaining ground which has been taken. Supposing that the question of time, as applied to adverse possession, has no application, they say this case comes within the rule of a Court of Equity, on the ground of acquiescence. I am rather at a loss to understand what that means, as applied to this case. What is this acquiescence more than an acquiescence of *non-claim*? If it is nothing more, I have already answered the objection. Can you, by the

term Acquiescence, give it a different effect from what it would have if you call it Non-claim? The doctrine of acquiescence, in a Court of Equity, proceeds on very plain principles. If, from the circumstances of conduct which have taken place, it can be considered that a disputed right has been expressly agreed to by the party who now desires to avoid the effect of it, acquiescence then applies; acquiescence then amounts to agreement; and such was the case, cited, of *Swanton v. Raven*, where, though the widow was not formally a party to the declaration of uses, yet it was her act as well as her husband's. It was said, your husband has been dead fifteen years, and you have never questioned the right till now. Is not that evidence that it is your act as well as his? You joined in the fine;—for fifteen years after your husband's death you permitted *A. B.* to continue in possession;—and, because you were not actually a party to the declaration of uses, you say the Court is not to bind you. But the Court must say, that was acquiescence. In what sense, acquiescence? Why, your acquiescence amounts to a waiver; you were aware of all the circumstances, you might have asserted your right sooner; and acquiescence is waiver, and not limitation of time. The principles of acquiescence, therefore, have not the least to do in this case.

It remains to consider, first, the case of the trustees; and, next, that of the representatives of Sir *Lawrence Palk*.

The trustees of Lord *Clinton* say, It is hard for us to be disturbed in the execution of these trusts. We have been acting under the orders of the Court in a suit instituted, after the late Lord *Clinton* died, for the management of the estate for the benefit of the present Lord *Clinton*, who was then an infant. Do those orders of the Court alter your situation, any more than if you

1817.

 CHOLMONDE-
 LEY
 v.
 CLINTON
 and Others.

1817.

CHOLMONDE-
LEY

v.

CLINTON
and Others.

had done what you have done without the orders of the Court? But the trustees have not much to complain of, because there is no prayer against them.

Then comes the case of Sir *Lawrence Palk's* representatives. Sir *Lawrence Palk* says, "I paid my money in the confidence that Lord *Clinton* had a good title." So every man who buys an estate or lends money upon it, does it in the confidence of a good title. But he says besides, "Earl *Horace* led me to believe, by the execution of the deed of 1794, that Lord *Clinton* had a good title. How could I imagine there was the least objection to Lord *Clinton's* estate, considering the effect of what Earl *Horace* did in 1794?" When you call upon the Court to judge what was the effect produced upon your minds by that deed, you must shew what the deed is. Whatever Earl *Horace* professes to do, in point of security to the title, by that deed, undoubtedly you, who advanced your money upon the credit of it, have a right to claim that security to the very utmost. But you never can pretend to have a right to security beyond the extent of that deed. You never can pretend that, if that deed amounts to a confirmation of the deed of 1781, so far only as that deed might be disturbed by the deed of 1785, you have a right to tell those who represent Earl *Horace* that you can claim protection against any thing more than that disturbance. The truth is, you made the same mistake as to the deed of 1781, as Lord *Clinton* made, and as Earl *Horace* made, when he acceded to the representation. The only way in which Sir *Lawrence Palk* can place himself in a different situation is, by virtue of the principle that he is a purchaser for valuable consideration without notice. But is he a purchaser for valuable consideration without notice of the title which the Plaintiff asserts against the Defendant? If he knew of the deed upon which our title

depends, and acted on the mistake as we did; how does he stand in a different situation from the person under whom he claims?

1817.



CHOLMONDELEY

vs.

CLINTON
and Others

There remains only one other ground to take notice of before I address myself to the consideration of the prayer for relief. They say, it is quite plain, supposing either of the Plaintiffs to be entitled to a decree, that this is not Lord *Cholmondeley's* estate, but *Mrs. Damer's*; and therefore the bill, as far as it is the bill of Lord *Cholmondeley*, must be dismissed. I recollect no instance of a bill filed by two Plaintiffs, where relief is given to one, being dismissed against the other. If it were so, why is Lord *Cholmondeley's* bill to be dismissed? They say, because, if *Mrs. Damer* were in truth entitled to this equity of redemption, Lord *Cholmondeley* can claim no interest in it except by assignment from *Mrs. Damer*; and, although he says she has assigned this equity of redemption, he has not proved it. I never before heard that a Defendant had a right to say, a matter in a cause is not proved, unless the Defendant had some interest in its being proved. If there be a matter alleged in a bill, which alters the right and character of the Defendant, undoubtedly, the Defendant has a right to say, "Prove it—do not come here for a decree against me upon allegation. You must have it upon proof." But what interest has any one of these Defendants in the fact that *Mrs. Damer* has assigned a share of her equity of redemption to Lord *Cholmondeley*? *Mrs. Damer* is the person alone interested; how does it alter the rights and interests of the Defendants, or the relief which these Plaintiffs, whether jointly or separately, are entitled to? Therefore I cannot help thinking this objection altogether unfounded.

(*Mr. Leach* concluded his reply, with commenting upon the prayer for relief; and proposing, as alterations

1817.

CHOLMONDE-
LEY
v.
CLINTON
and Others.

in the decree to be framed upon it, that the name of Lord *Clinton* should be substituted in the room of the Defendant *Drake's*, as the accounting party in respect of the mortgage, he having paid the money only in the name of the other Defendant; and also, by rendering Lord *Clinton* liable to account for the rents and profits received by him during the last six years only before the filing of the bill; admitting that the principle of limitation would apply by analogy to that case.)

The MASTER of the ROLLS.

June 28.

The substantial question in this Cause is, Which of the parties is entitled to an Estate, which, being derived from a Gentleman of the name of *Samuel Rolle*, is denominated the *Rolle* Estate. Lord *Clinton* and his Father had, for more than twenty years before the filing of the present Bill, been in the undisturbed possession of this Estate, and had been considered as the undoubted Owners of it. The Plaintiffs now say, that it was under a mistake with regard to the effect of a Deed executed in 1781, that this long enjoyment had been permitted; that, when the late Lord *Clinton* took possession of the Estate, it really belonged to the late *Horace Walpole*, Earl of *Orford*, and from him has either descended to the Plaintiff, Lord *Cholmondeley*, as his Heir at Law, or passed to the other Plaintiff, Mrs. *Damer*, as his General Devisee. The Estate is subject to a Mortgage, made prior to the time when the right of either of these parties accrued; and it is from this circumstance that the question of Title comes to be discussed in a Court of Equity. The Plaintiffs, assuming that the Equity of Redemption is in them, or one of them, filed this Bill, for the purpose, first, of redeeming the Mortgage, and secondly, of obtaining from Lord *Clinton* the possession of the Estate, and an account

(for a certain period at least) of the rents and profits which he has received.


1817.

CHOLMONDE-
LEY
v.
CLINTON
and Others.

The Mortgage has, in point of fact, become vested in a Trustee for Lord *Clinton*; but that does not in any degree affect the substance of the question between the parties. The last undisputed Owner of this Estate was *George* Earl of *Orford*, who died in the year 1791. He had succeeded to it on his Mother's death, as Tenant in tail under the Will of his Maternal Grandfather *Samuel Rolle*; and having suffered a Common Recovery, became seised of the fee, subject to a Mortgage for a term of years, which he afterwards converted into a Mortgage in fee. Being the Absolute Owner of this Estate, he (in 1781) executed a Settlement of it, on the effect of which the first question in the cause depends.

After a Recital, to which I shall afterwards more particularly advert, he limited the Estate to the use of himself for life; remainder to the heirs of his body; remainder, in default of such heirs, to such persons as he should appoint; with a remainder to the right heirs of *Samuel Rolle*; and then he reserved a general Power of Revocation and New Appointment. Under the limitation to the right heirs of *Samuel Rolle*, Lord *Clinton* claims to be entitled, as he was right heir of *Samuel Rolle* at the time of the death of Earl *George*, who had no issue, and never revoked the uses of the Settlement, nor executed any New Appointment under the Power.

If his claims under this Deed cannot be sustained, the consequence would be that the Estate descended to *Horace Walpole*, Earl of *Orford*; but, even then, it is contended by Lord *Clinton*, that he is entitled to the Estate, because (in the year 1794) *Horace* Earl of

1817.

 CHOLMONDE-
 LEY
 v.
 CLINTON
 and Others.

Orford executed a Deed, which supplied any defects that there might have been in his (Lord *Clinton's*) title, and conveyed all the interest which Earl *Horace* had in the estate. The effect of this deed of 1794 forms the second question in the Cause.

The last question, as between the Plaintiffs and Lord *Clinton*, is, whether, supposing neither of the deeds gave the latter any title to the Estate, the long possession which has been had of it by himself and his Father does not operate as a bar to the Plaintiff's claim.

I. I have already said, the first question turns on the limitation in the deed of 1781 to the right heirs of *Samuel Rolle*. It happened that *George* Earl of *Orford* was himself the right heir of *Samuel Rolle*. The strict effect of the limitation was, therefore, to leave the Reversion where, without any such limitation, it would have remained; namely, in Lord *Orford*, the Grantor in this Deed: and, on his death without issue, the fee would descend to his Heir at Law, who was *Horace* Earl of *Orford*. But Lord *Clinton* contends, that it is not in its strict literal sense that this limitation ought to be understood; that Lord *Orford's* intention appears to have been, so to settle the Estate, as to carry it to his relations on the Mother's side, in default of Issue of his own body; and that, to effectuate such intention, we must understand the words as designating, not the heirs of *Samuel Rolle* at the time of the execution of the Deed, but such persons as should be his heirs at the time when there should be a failure of Lord *Orford's* own issue. That Lord *Orford* had the intention which is ascribed to him, there can, I think, be no reasonable doubt. The Deed begins by stating his pedigree *ex parte maternâ*. He carries it up to *Theophilus* Earl of *Lincoln*, Baron *Clinton*, from whom the late Lord *Clinton* was also, in the female line, descended.

The professed consideration on which the Deed was made, was "the natural love and affection which he had and bore unto his relations the heirs of *Samuel Rolle*;" and the intent of the Settlement was, "that the Manors, Messuages, Lands, Tenements, and Hereditaments thereafter mentioned, might remain, continue, and be in the family and blood of his late Mother, *Margaret Countess of Orford*, on the side or part of her Father the said *Samuel Rolle*." It is clear that, if the limitation operates in the manner contended for by the Plaintiffs, this intention will be wholly defeated; for it will carry the Estate to the Paternal Uncle, who had in him none of the blood of *Margaret Countess of Orford*, Earl *George's* Mother. But the question is, whether the Court can mould the words of the Deed, so as to carry this intention into execution.

1817.

CHOLMONDE-
LEY
v.
CLINTON
and Others.

It is true that Courts ought to expound Deeds, as well as Wills, according to the intention of the Maker. But it has never been said, that a Court is so to frame or alter a Deed, as may best effectuate the maker's intention. The party is left to execute his own purpose in his own way. He may execute it unskilfully and insufficiently; but, if the dispositions which he makes are clear, and unambiguous, the Court cannot alter them merely because they are ineffectual to the attainment of the proposed end. As the words of this limitation stand, they are descriptive of the Person (whoever he might be) that was, at the time of the execution of the Deed, the heir of *Samuel Rolle*. Supposing we were to read this limitation without knowing who the person was that answered the description, no doubt could possibly be raised upon its construction. All would agree that the then existing right heir would take a vested remainder; and it would be impossible to contend that this was a contingent remainder to such

A Deed is to be expounded according to the Maker's Intention.

But the Court will not new model the Deed itself, or alter dispositions which are in themselves clear and unambiguous, because they happen to be ineffectual to the end proposed.

1817.

CHOLMONDE-

LEY

v.

CLINTON
and Others.

persons as should, at some future period, answer the description.

If the words of a deed are in themselves of doubtful signification, or there is no person to whom they can in their strict sense; apply, it is a subject for Inquiry, whether they may not be understood in a different sense.

When it is found that Lord *Orford* is himself the present right heir, do the words therefore change their meaning? No—but they are unskilfully employed; and, with the meaning that properly belongs to them, they will not effectuate the purpose which the Framer of the Instrument had in his contemplation. The sense of the limitation is unambiguous—the legal effect of it is clear; but it is a limitation which will not carry the Estate into the Channel in which the Grantor wished it to pass. If you can show then that the words are in themselves of doubtful signification, or that there is no person, to whom, in their strict technical sense, they can apply, you lay a ground for inquiring whether they may not be understood in a sense different from that which they properly bear. When, for instance, there is a limitation to the heirs of a living person, there is no one who answers the description; the question, therefore, arises, whether the words were not used as a designation of the Heir Apparent. So, where there is a limitation to an Heir male, as a Purchaser; and the Very Heir is a female; there is no person to whom the whole description in strictness applies. It is a question therefore who shall take under that ambiguous description. But, where the word “Heirs” is used without any qualification, and there is a person who completely answers the description, it would be a strong thing to say, that that is not the person to whom the description shall be applied. When you introduce the fact, that the person, whose heirs are spoken of, is alive, you raise an uncertainty as to the application of the description; but the fact, that Lord *Orford* was the Right Heir of *Samuel Rolle*, creates no uncertainty as to the meaning, or the application, of the words “right heirs.” The words do not become words

of futurity, because it happens that they apply to *A.*, and not to *B.*, nor words of uncertainty, because it is to *A.*, and not to *B.*, that they do apply.

But the argument is, that, if you give to them their proper meaning, and their proper application, the purpose of the Grantor will not be attained: and, therefore, you ought to conclude that he must have used them in some other than their proper sense; and that the sense in which the Court must understand them, or rather to which it must alter them, is that, by which the purpose of the Grantor would most effectually have been accomplished.

Supposing the Grantor had been apprised of the effect of such a limitation as he has actually made, there is little doubt that he would have framed it differently. But we cannot know, with the least certainty, how he would have framed it. In order even to conjecture what the alteration would have been, we must know wherein the mistake made by the framer of this Deed consisted. Did he suppose that a Remainder vests in the persons who answer the description at the time when the preceding limitations expire? Or did he overlook the circumstance that Lord *Orford* was himself the Right Heir of *Samuel Rolle*?—Or did he conceive that the Grantor could not himself be considered as the Object of his own grant, and that the words would therefore designate such persons as would, if Lord *Orford* were out of the question, answer the description of Right Heirs of *Samuel Rolle*? According to the nature of the misconception, under which the words actually used have been introduced into the Deed, would be the nature of the alteration, which (upon the correction of that misconception) would have been made. The Court is desired to say, that there is in this Deed (when properly construed) a limitation to such persons as should be the

1817.

CHOLMONDE-
LEY
v.
CLINTON
and Others.


1817.

CHOZMONDE-
LEY
v.
CLINTON
and Others.

right heirs of *Samuel Rolle* at the time when the preceding limitations should expire. The Deed itself does not furnish the least evidence of an intention so to frame the limitation; nor have we any ground for supposing that this is what the Drawer of the Deed conceived himself to have accomplished, when he used the words he has employed. It is only because this would have been the most proper limitation to effect the Grantor's object, that we are desired to say, it is the limitation which he has actually made.

If I were to indulge Conjecture, I should say, that there was no intention to frame the limitation in the manner now proposed; and that the blunder, which (unfortunately for Lord *Clinton*) has been committed, was, in all probability, of quite a different sort. Through whatever strange misapprehension it may have happened, I rather think, the words, "Right heirs of *Samuel Rolle*," were used as descriptive of actually existing persons, other than Lord *Orford* himself. For see what is said in the Recital.—He says, "In consideration of the natural love and affection which the said *George Earl of Orford* hath and beareth unto his relations the heirs of *Samuel Rolle*." Here he speaks of existing Relations, whom he describes as being then the Heirs of *Samuel Rolle*. How he came to think, that that appellation could apply to them, while he himself was living, it is impossible to guess. But, surely, it is much more probable that he used the words "Heirs of *Samuel Rolle*," in one part of the Deed, in the same sense in which it is manifest he used them in another, than that, after having spoken of "the love and affection" which he bore to existing persons, under that denomination, as one of his inducements for making the Deed, he should afterwards intend, by the very same denomination, to limit his Estate to some future unascertained persons, who might be altogether

unknown to him. I think, there would be more ground for contending, that this ought to be turned into an immediate limitation to the late Lord *Clinton* as the *persona designata*, though under an improper description, than into a prospective limitation to such persons as should, at a future period, answer that description. Yet it is in the latter way that the Defendants' Counsel contend the alteration ought to be made. Is not the very uncertainty how it should be made, the strongest reason for not at all attempting to alter words that have a plain meaning, merely because we could now substitute words that would have been much better adapted to the attainment of the object of the Grantor? There is nothing Executory in this Deed—nothing which, gives the Court a power to modify the means by which the Grantor himself proposed to arrive at his end. The Deed too is purely Voluntary.—There is no Contract which can entitle any person to say that, if the words of the Deed go beyond, or fall short of, the intended purpose, it ought to be so construed, or so reformed, as to place the parties in the situation in which, by their bargain, they were intended to stand.

1817.

**CHOLMONDE-
 LEY**
 v.
CLINTON
 and Others.

In the case of *Seymour v. Boreman* (a), where a son of the second marriage claimed to take under the appellation of Heir Male of the body of the Father and Mother, while there was a son of the first marriage living, though the intention was perfectly clear, yet the Lord Keeper said, the limitation was defective at Law, and the Plaintiff could have no remedy there; but that, according to the true meaning of the Marriage Agreement, he was well described to take the rent. It was therefore by virtue of the Contract, that the Court was there enabled to put upon the word "Heirs" a sense which, legally and strictly, it did not bear. But I have no con-

Seymour
 v.
Boreman.
 Under a settlement, the son of a second marriage held to take, as Heir male of the body of father and mother, although a son by a former marriage was living; by virtue of the Contract.

(a) Cha. Rep. 123.

1817.

CHOLMONDE-

LEY

v.

CLINTON
and Others.*Doe dem.**Bailey v. Pugh.*

Devise of estates in M. to the eldest son of the testator's son, for life, and of estates in H. to the second

and other sons; if but one, then all the real estates to him for his life, and "for want of "heirs of him," to the right heirs of the testator, "his son "excepted." Testator died, leaving a son, and daughters. Held by K. B. that the daughters took, as *personæ designatæ*; but the judgment reversed on writ of error.

tract here, which enables me to deal with the words according to the reciprocal intention of the parties.

I have looked into all the authorities that were referred to during the very able discussion which this subject underwent at the Bar, without discovering one which would serve as a precedent for the construction, or rather the alteration I am desired to make, even if this were the case of a Will, and not the case of a Deed. And, therefore, I have not thought it material to advert to the question, whether Deeds to Uses are to be construed with the same laxity as Wills, or with the same strictness as Common Law Conveyances,

I shall particularly mention only one Case, for the purpose of showing with what difficulty technical words are, even in a Will, diverted from their appropriate meaning, although the intention of the Testator seems obviously to require that they should not be applied to the person who properly answers the description. The case I mean is that of *Doe* on the demise of *Bailey v. Pugh (a)*. The Testator said, "As to my real estates, "after the decease of my wife, I give and devise to the "eldest son of my son begotten or to be begotten all my "estates in *London* and *Middlesex*, for his life—to the "second son all my estates in the county of *Hertford* for "his life, subject to pay all the charges of a man I have "appointed to look after them, keep them in good repair, " &c. and so on in the same manner to all the sons my "son may have—if but one son, then all the real estate "to him for his life; and, for want of heirs of him, to "the right heirs of me the Testator for ever, *my son excepted; it being my will he shall have no part of my "estates either real or personal.*" The Testator left this Son and three Daughters,—The Son died without issue, and then the question arose, who was to take

(a) Butl. Fearn's Cont. Rem. App. 3 Bro. P. C. Toml. Ed,

1817.

CHOLMONDE-
LEY
v.
CLINTON
and Others.

under this Devise “to his own right heirs, his Son excepted.” The Daughters contended that they must be the *personæ designatæ*, for that the Son, who was the Proper Heir, was plainly and manifestly excluded, not only by the intention, but by the express words; and the Court of K. B. were of that opinion; for they held, that the words were to be interpreted as if the Testator had said, “those who would be my right heirs if my “Son were dead.” The Case, however, went to the House of Lords upon a Writ of Error; and, when it came before Lord *Thurlow*, he proposed a question for the opinion of the Judges in the following terms:—“Whether any person, and who, took any and what “Estate under the Will mentioned in the Special Verdict by way of Devise and Purchase;” and, the Lord Chief Baron having delivered the unanimous opinion of the Judges present, that no person took any estate under the Will mentioned in the special verdict by way of Devise and Purchase, it was thereupon ordered and adjudged, that the Judgment given in the Court of K. B. should be reversed.—Now, that the Testator, in that case, could not mean his Son to take under the denomination of Right Heir, is at least as manifest as that Lord *Orford* did not mean to limit the Estate to himself under the appellation of The right heir of *Samuel Rolle*. The alteration suggested, as expressive of the Testator’s intent, in that case, was not at all stronger than that which is here proposed. It was as easy to say that the Testator meant Such person as would be right heir if his Son were dead, as to say that, by the limitation in this case, is meant Such person as would have been right heir if Lord *Orford* had been dead, or Such person as should be right heir at his death, or Such person as should be right heir on the failure of his issue. And, if we were at liberty to alter technical words, there was less room for uncertainty in that case, than there is in

1817.

CHOLMONDE-
LEY
v.
CLINTON
and Others.


this, how the alteration should be made. There was, in that case, an opening, and apparently even a call, for some construction to give a meaning to words which, literally taken, seemed to be repugnant and inconsistent; for, having reference to the fact that the excluded Son was the Heir, the limitation, according to the letter, was to his right heirs, his right heir excepted. Whereas, in our case, there is nothing repugnant, nothing insensible, in the words as they stand; and the Argument is, only, that the Grantor could not have meant to say that which he has plainly said. I should not, therefore, have thought the decision of the Court of K. B. would have been an authority for the alteration I am desired to make, while that of the House of Lords is a strong authority the other way. For it imports that, if there be a person who properly answers the description of Right Heir, those words cannot be a *designatio* of any other person, although the intent, not to apply them to the real heir, be perfectly manifest.

Upon the whole of this part of the Case, I am of Opinion, that Lord *Clinton* took no estate under the Deed of 1781. The effect of his taking possession on the death of Lord *Orford* I shall consider hereafter.

II. For the purpose of deciding the question upon the Deed of 1794, which stands next in order, I shall assume that, notwithstanding such possession, the whole Equitable Interest in the *Rolle* Estate became and remained vested in *Horace* Earl of *Orford*, the legal Estate continuing, as it had before been, in the Mortgagee.

The Deed of 1794 related only to an Equitable Estate; and it is in Equity that it must have its effect, and receive its construction. The circumstance which led to its execution appears upon the face of it. It was, at that time, supposed by every body, that Lord *Clinton*

had a perfectly good Title under the Deed of 1781, provided nothing had been subsequently done by Lord *Orford* by which that Deed would be affected. But when, in 1785, Lord *Orford* converted the mortgage for years into a mortgage in fee, he had reserved the Equity of Redemption to himself, his heirs and assigns. The doubt that occurred was, Whether this did not amount to a Revocation of the uses of the Deed of 1781, and a new Appointment of the Equity of Redemption to himself and his heirs.

1817.

 CHOLMONDE-
 LEY
 v.
 CLINTON
 and Others.

Horace Walpole Earl of *Orford* had taken opinions upon this point, and was advised, that this reservation would have no such effect. But, whatever might be the value of the doubt, Lord *Clinton* was desirous of having it removed; and Lord *Orford*, who knew it was worth nothing, readily consented to remove it. It is quite clear, that it was for this purpose, and this purpose only, that the Deed of 1794 was executed. And it seems to me, that it is to the execution of this purpose that the Deed is, even in its terms, confined; and that, if in words it extended further, it could not in Equity be allowed to have any more extensive operation. Lord *Clinton* will not say that his Father knew of any other objection to his title than that which arose from the deed of 1785; for it would have been a Fraud in him to have obtained a Deed of this kind on the ostensible pretext of obviating an objection arising from the Deed of 1785, while his real object was to cure a known, but concealed, defect in his Title under the Deed of 1781. Then he must admit, that the Deed was neither applied for, nor obtained, with any view to the purpose to which it is now endeavoured to convert it. Lord *Orford*, on his side, appears to have been equally ignorant that Lord *Clinton's* Title under the Deed of 1781 was in any way impeachable. In the Case privately submitted to his

1817.

CHOLMONDE-
LEY

v.

CLINTON
and Others.

Counsel, he does not suggest a doubt upon that point; while he is anxiously consulting them, Whether he may not have some claim to the estate under the Deed of 1785. If he had really known that he had any colour of claim under the Deed of 1781, and had intended to relinquish it, would he have executed that intention by stealth, and not even have given Lord *Clinton*, or introduced into the Deed, the smallest intimation that he was making such a sacrifice out of respect to his Nephew's intentions? We see that a sort of credit is taken, even for obviating the objection arising from the Deed of 1785, though Lord *Orford* was fully apprised that there was no validity in that objection. Whether a regard to his Nephew's intentions would have led him to give up his rights under the Deed of 1781, if he had known of their existence, is a matter upon which I shall not hazard a conjecture; but I think it certain that no such purpose was contemplated, or executed, by the Deed of 1794.

Although the general words in a Deed, taken by themselves, would be sufficient to pass the whole Interest which the party has to convey, yet, where it is clear that those words were used, and understood by all the parties to the Deed, only in subservience to a particular purpose, they

It is said, this is not like a Release, which may have a partial operation; but it is a Conveyance of the Estate, which must necessarily pass all the interest which the party has to convey. This supposes, that an interest will be held to pass without the knowledge, and against the intention, of all the parties to a Deed, provided there be any words in it that would, if taken by themselves, be sufficient to include that interest, however clear it may be that the general words are used only in subservience to a particular purpose. The Deed of 1794 plainly speaks this language:—"I agree to execute a Conveyance of the Estate; but for the purpose only, and to the intent only, of removing the doubt arising from the Deed of 1785, and of placing the title precisely in the same state in which it would have stood if that Deed had never been executed." Accordingly, the Deed of 1781 is expressly confirmed by the Deed of

1794; and this shows the sense in which *the Deed of the Trustees* is confirmed as an emanation from that of 1781.

1817.

CHOLMONDE-
LEY
v.
CLINTON
and Others.

It is very true, that both parties supposed, at the time, that the Deed of 1781 constituted Lord *Clinton's* title, and not Lord *Orford's* title. But still it was to be the Title to the Estate, and the erroneous opinion that was entertained with regard to its effect could not alter its legal operation, while it at the same time proves, that it could not be in the contemplation of either party, that Lord *Orford* should convey an interest, which he was supposed not to have, to Lord *Clinton*, who was supposed to be already in possession of it.

will not be held
to have an effect
beyond the par-
ticular purpose
so intended.

There is an unreported case of *Farewell v. Coker*, decided by Lord *King*, and afterwards carried to the House of Lords; which appears to me to bear materially on the present question. A person of the name of *Robert Coker*, who was tenant for life of an estate, remainder to his son in tail, remainder to himself in fee, made a Will, and devised in general terms All his Estate to his daughters. At a subsequent period, the surviving daughter executed a general Release to her brother, the tenant in tail, in words sufficiently ample to convey the Reversion which she took under her Father's Will.—She afterwards filed a Bill for the purpose of setting aside the Release.—A Bill was necessary, because the Release passed the legal interest in the Reversion.—A question arose, what was intended to pass by this Release. The sister contended, that all she meant by the Release, was to discharge her brother's estates of a portion to which she was entitled under some antecedent Settlement; that portion being secured in a different manner, by a Mortgage, which her brother had executed to her, upon a particular estate.—The brother being dead, those who claimed in his right alleged, on

Farewell
v.
Coker.

Reg. Lib. 1726.
A. fo. 197.

A. tenant for
life, with re-
mainder to his
Son in tail, with
remainder to
himself in fee,
devises "all his
Estate" to his
Daughters. The
surviving
Daughter exe-
cutes a general
Release to her
Brother (the
Tenant in tail)
in words suffi-
cient to pass the
Reversion in
fee. A Bill be-
ing filed by her

1817.

CHOLMONDLEY

v.

CLINTON
and Others.

to set aside this Release, upon the ground that it was meant only for a particular purpose, Lord Chancellor King at first decreed in favour of the Plaintiff, and afterwards, on a Re-hearing, directed issues to try, first, whether, at the time of the Execution of the Release, she knew, or was apprised of, her title under the Will to the Reversion; secondly, whether she intended, by the Release, to pass that Reversion. And, on Appeal to the House of Lords, this Decree was affirmed.

the other hand, that the purpose for which the Release was granted, was, plainly and distinctly, that of conveying her Reversion, in order to save her brother the necessity of suffering a common recovery, which he undoubtedly might have done. Upon the first hearing of the Cause, Lord King thought, that, under all the circumstances of the case, it sufficiently appeared that this Release was executed for a special and a particular purpose; and that, therefore, it ought not to be set up on the trial at law of a cause, which was depending between the parties, who contested the right to the estate upon other and different grounds.—Upon a Re-hearing, however, he altered his Decree; and he directed two Issues to be tried; first, “Whether the Appellant *Susannah*, at the time of the execution of the said Release, knew or was apprised, that she was entitled by the Will of *Robert Coker* her Father to the Reversion in fee of *Frome Farm*, and the other lands in question, expectant on the determination of an Estate tail to *Robert Coker* her Brother.—Secondly, Whether the said Appellant *Susannah* intended to pass and convey, by the said Release, the Reversion in fee claimed by her by virtue of the Will of *Robert Coker* her Father.”—Now this direction plainly implies, in the first place, that, if she did not know that she was entitled to this interest, it would not pass; secondly, that, if she did not intend it to pass, her Brother, or those who represented him, could not claim it under this Release. Yet the words of the Release were extremely strong; for it released to her Brother and his heirs “all the Manors, messuages, lands, tenements and hereditaments, and premises, whereof her Grandfather, her Father, her Brother, or any or either of them were seised, of any Estate of inheritance, in the county of *Dorset*, and all the Estate, right, title, interest, property, claim and demand, of her the said *Susannah*, in or to the same, by virtue of her said Father’s Will or

“ otherwise.”—Now she took the Reversion under her Father’s Will; and in this Release there were introduced the words, “ by virtue of her said Father’s Will, or “ otherwise, to hold the said premises, and the Reversion and Reversions, Remainder and Remainders, to “ the said *Robert Coker*, his heirs and assigns for ever.” The appellants were dissatisfied with Lord *King*’s alteration of his Decree, and they appealed to the House of Lords; but the Decree was there affirmed with Costs.

1817.

CHOLMONDLEY
v.
CLINTON
and Others.

From what is said in the case of Lord *Braybroke v. Inskip* (a), I collect the present Lord Chancellor’s Opinion to be, that a person called upon to join in a conveyance for the purpose of obviating a specified objection to a title, would not be bound, as to any other interest of which he was not apprised; though if he is told generally that there are objections to the title, and consents to join in the conveyance, it must be taken that he has enquired into the nature of the objections, and shall not afterwards raise a question about the extent of his information. In that case an objection was taken to the title, upon the supposed ground of illegitimacy of a person from whom it was necessary to deduce it.—If he was illegitimate, the title would have been in another person of the name of *Overall*. That Mr. *Overall* had, in the year 1750, executed a general Release of all right, title, and interest to this Estate; but it was executed only upon the occasion of his receiving payment of a sum of money which was due to him from the Estate of the Testator; and therefore it was not at all contended, that that Release, executed for that particular purpose, could be sufficient, of itself, to cure the alleged defect in the Title. But, pending the litigation about the Title, application was made to the heir of that *Overall*, and he consented to execute a general Release of all his right and interest in the Estate. The purchaser still ob-

Braybroke
v.
Inskip.

Where a man is called upon to join in a conveyance for the purpose of obviating a specified objection to title, he will not be bound by it, as to any interest of which he has not been apprised. But, if he consents to join in the conveyance, upon being told generally that there are objections to the title, he must be taken to have enquired into the nature of those objections, and

(a) 8 Ves. 417.

1817.

CHOLMONDE-
LEY
v.

CLINTON
and Others.

cannot after-
wards raise a
question as to
the extent of
his information.

jected that the title was not sufficient, and one of his reasons was, "because the Release of the 14th of February 1803 from *John Overall* does not state the grounds on which it is apprehended that he was entitled to a moiety of the Estate; and, consequently, the Defendant, or a future purchaser from him, cannot be sure that *John Overall* was fully apprised of his right to the moiety of the estate, which (the Defendant is advised) is clear, if Mr. *Robinson* was not born in wedlock." The Lord Chancellor first discusses the point of illegitimacy, and the degree of evidence which there was to raise that doubt. Then he says, "I am of opinion that the instrument executed in 1803, put an end to the title of the only man who could question it. I pass over the instrument of 1750; observing only, as it is admitted, that it ought not to be taken in Equity to have conveyed this reversionary right. As to the Instrument of 1803, though it might have been infinitely better drawn, without infusing into it any thing upon which a speculation could be raised as to legitimacy, upon what ground could *Overall*, as against a Purchaser, raise any objection? Suppose the purchaser to object, unless *Overall's* title is got in, *Overall* might, on being applied to, enquire the nature of his objections. But if, having only a general statement that they have objections, upon that communication he executes the instrument, and conveys, is there any thing to affect the conscience of the Purchaser, so that he could ever get back the Estate? I agree, if the objections were stated, the purchaser would have notice, that short information was given to *Overall*. If he does not ask the nature of the objections, he determines against himself as to any question between him and the Purchaser, if the Deed does not show that the objections were withheld from him (a)."

Now, supposing a person about to lend Money on Lord *Clinton's* Estate, had started a doubt upon the operation of the Deed of 1785, and had got just such a conveyance as Lord *Orford* executed, for the purpose of removing that doubt; he could not, upon the principle just stated, have availed himself of it to supply a total want of that title, which he, in the exercise of his own judgment, had supposed Lord *Clinton* could give him under the Deed of 1781. It does not appear, however, that this Deed of 1794 was ever shown to any body, or that any act was ever done, or any money ever advanced, upon the faith of it. From the Answer of the Trustees, I collect that they never heard of it; though it is made to them, and for the purpose of confirming their Estate. They do not appear to have heard of it, till the Bill was filed. I do not collect from Sir *Lawrence Palk's* Answer that he ever saw the Deed, or ever heard of it, till the Bill was filed; and therefore it cannot be taken that he lent his money on the faith of this Deed.

1817.

CHOLMONDE-
LEY
v.
CLINTON
and Others.

III. I come now to the third Question, upon the effect of the Length of Time. It seems to me that there is no room, in this case, for the operation of the Statute of Limitations. There is a possession of twenty years, but not in the character of Owner of the legal Estate, nor under any claim of being so entitled. The subsistence of the Mortgage has been all along recognised, and nothing but the Equity of Redemption was ever claimed by Lord *Clinton*. Even at Law it is not mere Possession that is sufficient to bar the claim of the True Owner. There must be something tantamount to a Disseisin.—Now, though there may be, what is deemed a Seisin of an Equitable Estate, there can be no Disseisin of it—first, because the Disseisin must be of the entire Estate, and not of a limited and partial interest in it—the Equitable Ownership cannot possibly be the subject of Disseisin—and secondly, because a Disseisin must

Mere possession is not sufficient, at law, to bar the claim of the true Owner, unless there has been a disseisin, or something tantamount.

There can be no disseisin of an equitable estate, because a disseisin must

1817.

CHOLMONDE-
LEY
v.

CLINTON
and Others.

be of the entire
Estate, and be-
cause a tortious
act cannot be
the foundation
of an equitable
title.

"Upon a
bare trust, no
Estate can be
gained by dis-
seisin, abate-
ment, or intru-
sion, whilst the
trust conti-
nues."

tortious act can never be the foundation of an Equitable Title. In the case of *Hopkins v. Hopkins* (a), Lord Hardwicke, speaking of analogy between uses and trusts, says, "It is very true this would not have been endured if Courts of Equity had not in general allowed these trust Estates to have the same consideration in point of policy with legal Estates, and given the same power to *cestuis que trust*, with respect to alienations, as if it was an use executed. Therefore, a tenant in tail of a trust may bar his issue by a fine:—a tenant in tail of a trust, remainder over, may dock the remainder by a common recovery; nay, some go so far as to say, he may do it by feoffment only. But all these are common assurances, and rightful methods, of conveying estates; for it was never allowed, that in trust estates, a like estate may be gained by wrong, as there might be of a legal Estate; therefore on a Trust in Equity, no Estate can be gained by dis-
seisin, abatement or intrusion. It is true, it may happen so upon a Trustee; and in consequence the *cestui que trust* may be affected; but that is on account of binding the legal Estate; but, on a bare trust, no Estate can be gained by disseisin, abatement or intrusion, whilst the trust continues." If George Earl of Orford had died seised of the legal fee, the late Lord Clinton, who entered on his death, would have gained an Estate by Abatement, which could only be defeated, in the first instance, by Entry, and, after a descent cast, by Action. And, after twenty years' continuance of the possession, no Ejectment could have been maintained. But Equity does not acknowledge that Lord Clinton, by entering without title, gained any Equitable interest in the Estate, and the Legal interest he does not profess to have acquired. An equitable Title may, undoubtedly, be barred by Length of Time; but it cannot be shifted or transferred. What

An equitable
title may be
barred by
length of time,

(a) 1 Atk. 581.

was once my Equity may, by my *laches*, be wholly extinguished; but it cannot, without my act, become the Equity of another person. It does not therefore follow, that an Equity can be acquired by length of possession, because by length of possession it may be barred. Here it is admitted that the Equity of Redemption subsists; and, so long as it subsists, the question, to whom it belongs, must remain open. Somebody is entitled to redeem, and to have a Conveyance of a Legal Estate. To whom is the Court to direct the Conveyance to be made? To him who shews a title?—or to him who has nothing to show, but a possession of twenty years? If to the latter, then a twenty years' possession must constitute, not merely a bar, but a positive title, to an Equitable Estate. Lord *Hardwicke's* position would no longer be true; for *Disseisin*, *Abatement* or *Intrusion*, would be available modes of acquiring Equitable Estates.

It will not be disputed that an Equity of Redemption is an Equitable right, for it is only in Equity that, after forfeiture, it has an existence; and, although the Equitable Ownership be in the Mortgagor, yet his Possession is of a more precarious nature than that of any other *Cestui que trust*. In general, a Trustee is not allowed to deprive his *Cestui que trust* of the possession, but a Mortgagee may assume the possession whenever he pleases, and therefore a Mortgagor is called Tenant at will to the Mortgagee, and, in point of Possession, he is so, even in Equity: for a Court of Equity never interferes to prevent the Mortgagee from assuming the possession. It cannot be said, therefore, that Lord *Clinton*, who acknowledged the title of the Mortgagee, has had any other than a precarious and permissive Possession, which would be insufficient for the acquisition of a Right, even supposing that by any possession an Equitable right could be acquired. By the Civil Law, Prescription can only run in favour of him, "*qui, neque vi, neque clam, neque precario, possidet.*"

1817.

CHOLMONDE-
LEY
v.
CLINTON
and Others.

but cannot be shifted or transferred. No equity can be acquired by length of possession.

An Equity of Redemption is, after forfeiture, a merely equitable right, and the possession of the Mortgagor is more precarious than that of any other *Cestui que trust*. In point of possession, the Mortgagor is a mere tenant at will, even in Equity.

By the Civil Law, a mere permissive Pos-

1817.

CHOLMONDE-
LEY
v.
CLINTON
and Others.

A Permissive Possession, however long it might in point of fact have endured, could never ripen into a Title against any body; for it was not considered as the possession of the precarious occupier, but of him upon whose pleasure its continuance depended.

session can
never give a
title by Pre-
scription.

A *Cestui que trust*, having a substantive, independent possession, may gain the legal estate by Disseisin; but a Mortgagor cannot disseise his Mortgagee, because his possession is that of the Mortgagee.

So long as a trust subsists, the right of a *Cestui que trust* cannot be barred by the length of time during which he has been out of possession.


A *Cestui que trust* can be barred, only by barring and excluding the

Lord *Hardwicke* somewhere says, that a *Cestui que trust* may disseise his Trustee, and gain the Legal Estate. Doubtless, the Legal Estate may be gained by Disseisin. The *Cestui que trust* may have a substantive, independent possession; but a Mortgagor never can disseise his Mortgagee. Why?—because his possession is not properly his own, but that of the Mortgagee. In *Harwood v. Oglander* (a), it was considered as doubtful, whether the Trust continued to subsist, or whether the long possession had not disseised the Trustee himself; but it was conceived, by Lord *Alvanley* first, and afterwards by the present Lord Chancellor, that, if it subsisted, and if the Trustee could recover as having the Legal Estate, it would follow that the right of one of the *Cestuis que trust* could not be barred by the length of time during which he had been out of possession. On that principle, Lord *Macclesfield*, in the case of *Lawley v. Lawley* (b), overruled the Plea of the Statute of Limitations, on the ground that the Legal Estate was in Trustees. There, in a Marriage Settlement, one of the Trusts was, if the wife survived, to pay to her the rents and profits of certain lands, as the same were at that time let. The husband, during his life, greatly increased the rents of the Estate; and, upon his death, the wife enjoyed the whole of the rents, making no distinction between the original and the additional rent. About fourteen years after her death, the Heir at law filed a Bill for the purpose of recovering the Surplus Rents. The Statute of Limitations was pleaded; and on the ground I have stated—that the Estate was in Trustees—Lord *Macclesfield* disallowed the plea. Now, it is perfectly clear that, under any other

(a) 6 Ves. 199. 8 Ves. 106.

(b) 9 Mod. 32.

circumstances, the demand for those rents would have been barred; but it was conceived, that, so long as the Trust subsisted, so long it was impossible that the *Cestuis que trust* could be barred. The *Cestuis que trust* could only be barred by barring and excluding the Estate of the Trustee. In the present case, the Trust subsists. The Mortgagee is trustee of the legal estate for the person who has the Equity of Redemption. And I am of opinion that the person who has the Equity of Redemption is the Plaintiff, Mrs. *Damer*, as the Devisee of *Horace Earl of Orford*. For, as there could be no Disseisin of an Equitable Estate, there was nothing to prevent him from devising this interest, and the general words of his will are sufficient to include it. It does not appear to me, therefore, that Lord *Cholmondeley* could have any other interest in this estate, than Mrs. *Damer* may have thought fit to convey to him, if she has conveyed any;—of which there is no evidence in the cause, and therefore I do not conceive that I can take notice of the existence of the fact.

1817.

CHOLMONDELEY.
 v.
CLINTON
 and Others.
 Estate of his
 Trustee.

Having thus given my opinion upon the three questions that have been made, as between the Plaintiffs and Lord *Clinton*, I think it right to revert back to the first of them, for the purpose of observing that it is merely a legal question. It was, however, fully argued, and no wish was expressed on either side to have it sent to another tribunal. The opinion I have formed upon it, I have therefore delivered. But, as it is purely a question of law, and, as such important interests are to be affected by the decision, I should still think it right, if it is desired by Lord *Clinton's* Counsel, to send a Case for the opinion of a Court of Law.

IV. Before I conclude, I must say a word on the attempt made by Sir *Lawrence Palk's* Counsel to dis-
 tinguish his Case from that of Lord *Clinton*. I cannot
 conceive, on what ground they can object to a Decree,
 There can be no Acquiescence in acts which the Party

1817.

CHOLMONDE-
LEY

v.

CLINTON
and Others.

is ignorant, at
the time, that
he has any
right to dis-
pute.

which Lord *Clinton* himself cannot successfully resist. Sir *Lawrence Palk* is a Mortgagee, under Lord *Clinton*, or Lord *Clinton's* Trustees. He has lent money on, what turns out to be, a bad title. Where is the obligation upon the right owner to give him a good one? He cannot even allege, that he was misled by the long possession, which Lord *Clinton* had had, of the Estate; for he advanced his money in 1794.—Was Lord *Orford's* title, as against him, barred by the lapse of three years? He cannot even say that he was misled by the construction of the Deed of 1794—for it is not alluded to, in his Mortgage, as forming any part of Lord *Clinton's* title; and it does not appear that he, any more than the Trustees, knew any thing of its existence.—If, indeed, Lord *Orford* had been aware of his title, and had stood by and seen persons advancing money on the Estate, on the faith of its belonging to Lord *Clinton*, some Question might be made on the ground of Acquiescence: but Lord *Orford* could not be said to acquiesce in acts which he did not know he had any right to dispute; and therefore all that has been said about Acquiescence, either on the part of Lord *Clinton* or Sir *Lawrence Palk*, seems to be irrelevant, in a case where all parties were under the influence of the same common mistake.

There is no principle, therefore, on which I can hold that Sir *Lawrence Palk's* Mortgage is a good charge on the Equity of Redemption.

The Counsel for the Defendant Lord *Clinton* consented to take a Case for the opinion of a Court of Law upon the first Question.

R E P O R T S

OF

CASES

ARGUED & DETERMINED

IN THE

HIGH COURT OF CHANCERY,

Commencing in the Sittings before

MICHAELMAS TERM,

57 Geo. 3. 1816.

1817.

LEAKE, and Others, - PLAINTIFFS;

AND

ROBINSON, and Others - DEFENDANTS.

ROLLS.
Feb.

JOHN MILWARD ROWE, by his will, dated the 17th of *June*, 1790, gave to the Plaintiffs (whom he appointed executors,) all his three *per cent.* and four *per cent.* stock, upon trust, in the first place, to pay to his wife, *Sukey Rowe*, during her life, two several annuities of £245. 8s., and £168, out of the dividends of the four *per cents*, (which with certain other provisions, were declared to be in bar of dower and thirds,) and in the next place, to pay and apply an annuity of £54. 12s. (thereby given) towards the maintenance, education, or advancement of his grandson, *William Rowe Robinson*, until he should attain twenty-

Gift of real and personal estate, to trustees, upon trust to apply the rents and dividends, (or so much as they should think fit,) to the maintenance, &c. of *W. R. R.* until twenty-five; then to permit him to

1817.

LEAKE

v.

ROBINSON.

receive the same during his life; and, after his death, to apply the same (or so much, &c.) to the

maintenance, &c. of all and every the children of *W. R. R.* until twenty-five respectively; then upon trust, to assign and transfer to such children so attaining twenty-five; and in "case *W. R. R.* shall " die without leaving issue living at the time of his death, or leaving " such, and all die before twenty-five," upon trust, to pay, &c. unto and among all and every the brothers and sisters of *W. R. R.*, share and share alike, upon their attainment of twenty-five, or marriage respectively. Followed by a gift of residue, upon trust, as to one moiety, to permit the testator's daughter *A.*, and her husband, to receive the rents, &c. during their lives in succession, and, after the death of the survivor, to the children (except *W. R. R.*) in the same manner as with respect to the former gift. And, as to the other moiety, upon like trusts for the testator's daughter *B.*, her husband and family; with survivorship between the respective grand-children; and, in case of the death of either of the daughters without leaving issue living at her decease, then to the children of the surviving daughter.

Held, that the limitation to the brothers and sisters of *W. R. R.* in default of issue living to attain twenty-five, was intended to include all his brothers and sisters living at his death, and was consequently void for remoteness.

Held, vested interests at twenty-five in every instance, notwithstanding different expressions, there being no antecedent gift, of which it could have been the testator's intention merely to postpone the enjoyment; the gift being only the direction to pay at twenty-five.

A. having died, leaving issue, the moiety of the residue intended for her children held undisposed of, as being void for remoteness. The other moiety held to rest in contingency during the life of *B.*; and, if she should die without issue, to be well given over to the children of *A.*

five; and from and after his attainment of that age, to pay him the said annuity during his life: and after his decease, the testator bequeathed the principal sum of £1,820, (part of his three *per cent.* annuities,) or so much thereof as should produce the annual sum of £54. 12s. as after mentioned; and after the decease of his wife, he directed that his said executors should pay and apply the annual sum of £145, (part of the annuity of £245. 8s.) and the annual sum of £40 (part of the

annuity of £168) towards the maintenance of the said *W. R. Robinson* till twenty-five; and afterwards for his life, and after his decease, bequeathed the principal sums of £4,846. 16s. 8d. three *per cents*, and £1,000, four *per cents*, as after mentioned.

1817.
LEAKE
v.
ROBINSON.

The testator then directed the Plaintiffs to apply the dividends of £3,333. 6s. 8d., three *per cents*, for the maintenance and advancement of his grandson, *Charles Mitford*, until twenty-five, and upon his attaining that age, to transfer to him the said principal sum of £3,333. 6s. 8d. three *per cents*.

He then gave to the Plaintiffs £1,000 *India* stock upon trust, to apply the dividends, &c. thereof, and also the annual sum of £100, (part of the dividends, &c. of his three *per cent*. stock,) or so much as they should think fit, towards the maintenance, education, and advancement of his said grandson *William Rowe Robinson*, until twenty-five; and upon his attaining that age, he gave to him the dividends of the said stock during his life; and after his decease, he bequeathed the said £1,000 *East India* stock, and the sum of £3,333. 6s. 8d., three *per cents*, (the dividends whereof then produced £100, *per ann.*) as after mentioned.

The testator then devised and bequeathed to the plaintiffs, their heirs, &c. all his real estates at *Westham* and *Pevensey*, of which he was seised in fee, or as mortgagee in possession, or otherwise, and the principal sums charged thereon, and the ground-rents issuing out of his messuages in *Hedge Lane*, upon trust to apply the said ground-rents, and the rents and profits of his said estates, and interest of the said mortgage monies, or such parts as they should judge proper, towards the maintenance, education, or advancement of

1817.

LEAKE

v.

ROBINSON.

his said grandson, *William Rowe Robinson*, until twenty-five; and after his attaining that age, to pay to, or permit him to have and receive the same during his life, and after his death, (in case he should leave any lawful issue,) to pay and apply the said several annual sums of £54. 12s., £145. 8s. £100 and £40, and the dividends of the said £1,000 *India* stock, and the rents and profits of the said estates at *Westham* and *Pevensey*, and the interest of the said mortgage monies, and the said ground-rents, or such part thereof as they (the Plaintiffs) should think proper, unto, and for the maintenance, education, and advancement of all and every the child and children of the said *William Rowe Robinson*, lawfully begotten, until (being sons) they should respectively attain twenty-five, or (being daughters,) should attain such age, or marry with the consent of parents or guardians; and then to pay, transfer, and assign an equal proportion of the said several principal sums of £1,820., £4,846. 16s. 8d. and £3,333. 6s. 8d. three *per cents*, £1,000 four *per cents*, and £1,000 *East India* stock, and the said ground-rents and estates at *Westham* and *Pevensey*, and the mortgage monies, and all the interest, dividends, or rents, due or payable in respect of the same, “ to such child or children, being
 “ a son or sons, who shall attain such age or ages of
 “ twenty-five as aforesaid, and to such child or children,
 “ being a daughter or daughters who shall attain such
 “ age or ages, or be married as aforesaid, his, her, or
 “ their heirs, executors, or administrators; if only one
 “ such child, or, having been more, if all but one should
 “ die, before their shares should become payable as
 “ aforesaid, than the whole to such only, or surviving
 “ child.”

The testator then directed as follows; that “in case
 “ the said *William Rowe Robinson* shall happen to die
 “ without leaving issue, living at the time of his decease

“ or leaving such, they shall all die before any of them
 “ shall attain twenty-five, if sons, and if daughters,
 “ before they shall attain such age, or be married as
 “ aforesaid;” then the plaintiffs should pay, apply, and
 transfer the said principal sums of stock, ground-rents,
 estates and mortgage monies, “ unto and amongst all
 “ and every the brothers and sisters of the said *William*
 “ *Rowe Robinson*, share and share alike, upon his, her,
 “ or their attaining twenty-five, if a brother or brothers,
 “ and if a sister or sisters, at such age or marriage, with
 “ such consent as aforesaid.”

1817.
 LEAKE
 v.
 ROBINSON.

He then directed the Plaintiffs to invest the surplus or savings to arise out of the said several annuities, dividends, ground-rents, and interest, until his said grandson, *William Rowe Robinson*, or his issue, (if any,) or his brothers and sisters who should become entitled as aforesaid, should attain twenty-five, or be married as aforesaid, and pay and apply the same for the benefit of the person or persons entitled, upon the attainment of such age or marriage respectively.

The testator then (after making certain provisions out of the remainder of his stock before bequeathed to the Plaintiffs for others of his grandchildren,) gave to the Plaintiffs, their executors, &c. all sums of money then due to him on mortgage, (except those secured on the estates at *Westham* and *Pevensay*,) upon trust, to pay one moiety of the interest to his daughter *Mrs. Robinson*, for her life, and after her death to her husband, *George Robinson*, for his life, and after the death of the survivor, in and towards the maintenance and advancement of *W. R. Robinson*, till twenty-five, and after, &c. to *W. R. Robinson* for life, and after his decease, towards the maintenance and advancement of all and every his child and children, till twenty-five, or marriage as

1817.

LEAKE

v.

ROBINSON.

aforesaid, and upon trust, to pay or assign an equal proportion of such moiety of the said mortgage monies, to such child or children respectively, and in case the said *William Rowe Robinson* should die without leaving issue, or all such issue should die before twenty-five, or marriage as aforesaid, then upon trust to pay and divide the same, unto and among all and every the brothers and sisters of the said *William Rowe Robinson*, share and share alike, at their respective ages of twenty-five, or marriage as aforesaid: with interest in the mean time, for such brothers and sisters, as before directed with respect to the issue (if any) of the said *William Rowe Robinson*.

He then directed the Plaintiffs to pay the other moiety of the interest due to him on mortgage, to his daughter *Frances Dippery Mitford*, and her husband *William Mitford*, for their lives and the life of the survivor, and after the decease of the survivor of them, to pay and dispose of the said interest and principal monies, to and among their children, in the same manner as he had before directed, with respect to the issue (if any) of the said *William Rowe Robinson*.

The testator then gave to the Plaintiffs, their heirs, executors, &c. all the residue and remainder of his real and personal estate and effects not before disposed of, upon trust to sell, (in case his daughters should think proper and so direct,) and lay out the produce in the purchase of real estates on government securities, and out of such real and personal estate till disposed of, and the produce, &c. to pay one moiety of the rents, interest, and dividends to his daughter, *Mrs. Robinson* for her life, and after her death, to her husband for his life, and after the death of the survivor, to pay and apply the said moiety, or so much thereof as they

should think fit, unto, or for the maintenance, education, and advancement of the said child and children of the said *Elizabeth Grace Robinson*, by the said *George Robinson*, (other than and except the said *W. R. Robinson*,) until they should attain twenty-five, or marry. as aforesaid, in equal shares and proportions, and after the attainment of such age or marriage, to pay and transfer all such moiety of the residue or produce thereof, to and among such child or children, in equal shares and proportions, and with regard to the remaining moiety, he directed that his daughter *Mrs. Mitford*, and her husband, and the child or children (if any) of them, and their issue, should have and enjoy the same, in the same manner as before expressed with regard to his daughter *Mrs. Robinson* and her family. The testator then directed, that in case of the death of any of his said grand-children before attaining twenty-five or marriage, the shares of them so dying, should go to the survivors of their respective brothers and sisters; and in case of the death of either of his said two daughters, without leaving issue by her said husband, living at her decease, or any child or children of such issue, then and in such case, the share or proportion of such part of his estate or effects given by him, or intended for such issue, or the child or children of such issue, should go to and be divided amongst the issue of his surviving daughter, by her then husband, or the child or children of such issue who might be dead, equally, share and share alike; and in case both his said daughters should die without issue living at their respective deceases by their then respective husbands, or any child or children of such issue who might be deceased, then he directed that each of his said daughters (subject to the life-interest of their then husbands,) might (notwithstanding their coverture,) give and dispose of her share and proportion of his said estate and effects to such person

1817.

 LEAKE
 v.
 ROBINSON.

1817.

LEAKE

v.

ROBINSON.

or persons as she might think proper, either by deed or will.

On the 17th of *June*, 1790, when the testator made this will, his grandson *William Rowe Robinson*, had one brother and three sisters living. Between the date of the will and the testator's death, he had another sister born.

On the 9th of *February*, 1792, the testator died. Between the death of the testator and the death of *William Rowe Robinson*, the said *William Rowe Robinson* had two other brothers born. On the 10th of *October*, 1800, *William Rowe Robinson* died; having attained twenty-five without issue, unmarried and intestate; and another sister was born after his death.

At the time of the testator's will, and of his death, Mr. and Mrs. *Mitford* had five children, one of whom was since dead, leaving issue; and after the testator's death, they had another child.

Sukey Rowe, the testator's widow, survived him, and died in 1804, having first made her will, and appointed Mr. *Mitford*, and another, executors thereof. Mrs. *Mitford* was also dead, and her husband had taken out administration.

Under these circumstances, the question for the decision of the Court was, whether, in the event which happened, of the death of *William Rowe Robinson* without issue, the limitation to his Brothers and Sisters, to take effect on their attainment of the age of twenty-five, or marriage as aforesaid, was a good and effectual limitation, or was void, as being too remote. And this principally depended on the determination of two other questions,

viz. first, what classes of persons were those intended by the Testator to take, in the event of *William Rowe Robinson* dying without issue, or without issue living to attain the age of twenty-five, under the description of "all and every the Brothers and Sisters of the said *William Rowe Robinson*;" because, if that limitation were held to extend to all the Brothers and Sisters who might be born, and (in the event which happened) actually were born, after the death of the Testator, and the period of vesting was postponed by the will till their attainment of the age of twenty-five, it is obvious that more than twenty-one years, (the period beyond which a limitation by way of executory devise cannot take effect) might pass after the death of the Testator before the arrival of the limited time: and this, consequently, gave rise to the second question; which was, whether the attainment of twenty-five was in fact the period assigned for the vesting of the several shares, or was to be taken only as the time fixed for the payment of the several shares which had already vested at some antecedent period.

Sir *Arthur Piggott*, *Horne*, and *Sugden*, for the Defendant *Wm. Mitford*, (claiming, on behalf of himself and his children, all such benefits as were intended by the will, and also, as administrator to his deceased wife, one-third in the undisposed residue. And claiming also as executor of *Sukey Rowe* deceased, in the revived suit.)

The Testator has by this will made three distinct gifts of different parts of his property — First, of his real estates and the bulk of his personal property — Secondly, of the mortgages — And lastly, of the residue previously undisposed of, as not falling within either of the former descriptions.

1817.
LEAKE
v.
ROBINSON.

1817.

LEAKE

v.

ROBINSON.

With regard to the first, the disposition is upon trust to apply such parts of the rents and profits, &c. as the trustees might think proper, for the maintenance of his Grandson *W. R. Robinson* till twenty-five, and, “after his attaining that age,” to pay the whole annual produce to, or permit him to receive the same, during his life; giving him thereby a vested interest upon his attaining that age, and no sooner. Then follow the provisions respecting the Children of *W. R. Robinson*, expressed in such a manner as unquestionably to include *all* the Children that *W. R. Robinson* might at any time have; and lastly the ultimate limitation, in the event of his having no child or children who should live to attain twenty-five, in favour of the Brothers and Sisters, which is expressed in precisely the same general terms as the former — “unto and amongst *all and every* the Brothers and Sisters of the said *W. R. R.*, share and share alike, on attaining twenty-five,” &c.

Now, if the first limitation be held (as it must be admitted) to include *all* the Children, there can be no reason why the second, which is expressed in the same terms, should not be taken to embrace *all* the Brothers and Sisters. As to this point, the case of *Baldwin v. Karver* (*a*), which has been considered as a leading authority ever since its decision, is conclusive, to shew, that all, whenever born, must come within the meaning of such a devise; and in *Walker v. Shore* (*b*), the Lord Chancellor, following the same rule, observes, that, although in that case “the Testator probably meant Children living at his own death, yet upon the authorities the will must be construed to mean such as should come into existence before the period of distribution; a rule,” he says, “which is not to be shaken, unless a

(a) Cowp. 309.

(b) 15 Ves. 125.

time of distribution is expressly provided, excluding all who may afterwards come into existence." It is not necessary, in order to the operation of this rule, to shew that it was the intention of the Testator to comprehend all the Children. It is enough that the law presumes such an intention; and, if so, then in the present case the gift over is clearly void as being too remote. It is not the case of separate and distinct gifts to individuals, some of whom are capable of benefiting by it and others not. It is a single gift to a class of persons, some of whom are incapable of taking by the rule of law; and the consequence is, that the gift must fail altogether. In *Longhead v. Phelps* (a), there was a legal term, the trusts of which were to take effect on either of two contingencies, one of which was within the allowed limits; and it was held to be good in that event, which had happened. But that is clearly distinguishable from the present case. There is no authority enabling the Court either to cut down the limitation of the period for vesting, or to confine the objects. In *Proctor v. Bishop of Bath and Wells* (b), the first devise being void as depending on a contingency too remote, the latter could not be let in to take effect, even though, in the event which happened, it would have vested immediately. In *Cambridge v. Rous* (c), which was a bequest to A. for life, and after her decease to her children at the age of twenty-seven respectively, and in the event of her not leaving any children, or of the death of all under twenty-seven, it was contended that the court had power to exclude those who were born beyond the limits which amount to a legal perpetuity; but it was held on the contrary that the limitation over was altogether too remote. In the present case, it cannot be said that it would be giving effect

1817.
LEAKE
v.
ROBINSON.

(a) 2 Blackst. 704. See (b) 2 H. Bl. 358.
Powell's Fearn's Ex. Dev. (c) 8 Ves. 24.
p. 154, 457.

1817.

LEAKE

v.

ROBINSON.

to the Testator's intention to introduce a distinction which would exclude, perhaps, the majority of the intended objects of his bounty. The cases go far to shew that the Court has no authority, in such circumstances, to make a will for the Testator. *Routledge v. Dorril* (a). *Gee v. Audley* (b). In the former of which, being the case of a power, the Donee might have appointed among such only as were objects of the power within the rule of perpetuity; but, as he had not done so, the limitation was held to be void. That case was stronger than the present; for it might have been thought that the Court would aid the execution of a Power, void only for excess, by restraining the operation. An argument which has no room in this instance, and was, even there, not suffered to prevail.

The second gift, which attaches on the Monies due upon mortgage, falls entirely within the same doctrine as that already discussed. It is a gift to the Parents during their lives, and afterwards to their children, in words which must be taken to include all the children; and there is no limitation over. This is consequently void, as well as the preceding.

Then, with respect to the gift of the Residue, it is clear that the property comprised in the two former bequests is not included in it, the Testator having expressly excepted out of that gift all that was "before specifically disposed of;" and as he, at that time, supposed that he had exhausted the subjects of his two former bequests, it follows that it was not his intention to pass them by the residuary clause. The trusts upon which it is given make his intention still further manifest; for he has

(a) 2 Ves. j. 357.

(b) 2 Ves. j. 365. n. and
see the same case in 1 Cox.
324. *Jec v. Audley*.

directed his Trustees (with the consent of the persons entitled for life) to sell and dispose of the residue immediately after his death ; a trust which he could not possibly have meant to be applied to the two first funds.

1817.
LEAKE
v.
ROBINSON.

Besides, the residuary disposition is altogether inconsistent with that which the Testator conceived himself to have already made of the two former funds, and has therefore no application whatever to them ; and thus the case falls within the principle of Your Honor's judgment in *Church v. Munday* (a), which, though the Lord Chancellor afterwards differed in opinion (b), is strongly borne out by the decision of the Court of King's Bench in *Roe v. Avis* (c). Where a gift is made to a person who is excluded from taking by a rule of law, as in *Proctor v. The Bishop of Bath and Wells* (d), there is a manifest incongruity in holding that it falls into the residuary estate which is applied by the Testator to different, and, as in this case, inconsistent purposes.

It may be said that the ultimate proviso rides over the whole property ; but it is clearly, by the context, confined to the residuary estate. In the clause immediately preceding there is a general gift over to the issue of the surviving Daughter in case of the death of either without leaving issue living at her decease ; whereas, in all the previous gifts, the property is, either expressly or by reference, given over, in case of the death of either. From this it necessarily follows that the clause of survivorship is confined to the residue ; and the words " his said estate and effects " in the concluding clause, can only be construed as referring to the same words used in the clause of survivorship.

(a) 12 Ves. 426. and see *Welby v. Welby*, 2 Ves. and B. 187, 197.

(b) On Appeal, 15 Ves. 396.
(c) 4 T. R. 605.
(d) 2 H. Bl. 358.

1817:

LEAKE
v.
ROBINSON.

But, whatever may be the intended application of this proviso, the gift of the residue after the death of the respective tenants for life is, in the first instance, void, as being limited upon the same events as those upon which the preceding dispositions are designed to take effect. Then, with respect to the share given to Mrs. *Mitford* and her children, the clause of Survivorship cannot operate upon it, as she is dead, having left issue living at her decease. And, as to the other share, the gift over also fails of effect by the death of Mrs. *Mitford* in Mrs. *Robinson's* life-time, unless the expression “surviving Sister” can be taken to mean *other*, a construction which ought not to be allowed to prevail against express words. ,

Another question remains, as to the right of the Testator's widow to her Dower and thirds out of the property which may prove to have been undisposed of by the Will, the provisions thereby made for her being expressed to be in bar of such dower and thirds; but this is settled by *Pickering v. Lord Stamford (a)*, which has decided that such a clause does not extend to deprive her of the Widow's share of property which turns out to be undisposed of by reason of a defective gift; a decision, which the Lord Chancellor, in *Garthshore v. Chalie (b)*, refers to with approbation.

Sir *S. Romilly* and *Preston*, (for one of the children of Mrs. *Robinson* born before the date of the will, and another who was born after the date of the will, but in the testator's life time.)

With regard to the two first bequests, the validity of which is the subject of dispute in this case, the limitations over to the brothers and sisters of *W. R. Robinson* are

(a) 3 Ves. 332, 492.

(b) 10 Ves. 1.

good, in the event which has happened of *W. R. Robinson's* death without issue, to the extent of such of the brothers and sisters as by law were capable of taking — *i. e.* all who were born in the testator's life-time. *Baldwin v. Karver*. We admit that the gift to the children of *W. R. Robinson* is void as being too remote, and that the limitation over would consequently be void, according to the doctrine of *Proctor v. The Bishop of Bath and Wells*, if it were made to depend on the single contingency of those children not living to attain twenty-five. But where there are two contingencies, on either of which the limitation is to take effect, and one of them is within the allowed limits, *viz.* the death of *W. R. Robinson* without leaving issue living at his decease, that falls exactly within the principle of *Longhead v. Phelps*, and the limitation is good on the happening of the alternate event. *Crompe v. Barrow*. (a) Then, suppose the persons intended to take upon that event were some of them capable, and others incapable, of taking according to the rule of law, the consequence would be, not that the limitation should fail altogether, because the intention, that all should take, cannot be carried strictly into effect, but that those should take, who by law are capable. *Blandford v. Thackrell*. (b) *Thelusson v. Woodford* (c), where the principle is much discussed, particularly in Mr. Justice *Lawrence's* judgment. *Wilkinson v. Adam*. (d) *Mogg v. Mogg*. (e) The only case adduced against this view of the subject is *Routledge v. Dorril*, which was the case of a gift by virtue of a power of appointment, and in which the appointment was held to be void, in deference to a settled rule, that whoever will take under the execution of a power must be capable of taking under the deed creating the power; and

1817.

LEAKE

v.

ROBINSON.

(a) 4 Ves. 681.

(b) 2 Ves. j. 238.

(c) 4 Ves. 312.

(d) 1 Ves. and B. 422.

(e) Ante, vol. i. 654.

1817.

LEAKE

v.

ROBINSON.

that every appointment under a power must be construed with reference to the date of that instrument (a) whereas a will takes effect with reference not to the time of its execution, but to the time of the testator's death. No case goes the length of deciding that persons who are capable of taking under a will shall not take, merely because they are joined in the bequest with others who are incapable. But, with regard to those of the brothers and sisters of *W. R. Robinson*, who were not *in esse* at the time of the death of the testator, the rule of law is too strong for them; and consequently they, and they only, must be held to be excluded.

As to the gift of the residue, there is this fallacy in the argument as to the particular intention of the testator, and the inconsistency of that disposition with the designed effect of the preceding bequests, viz. that a residuary bequest necessarily includes all that is not before disposed of, whether it was, or was not, in the contemplation of the testator at the time of making his will.

Hart, Bell and Shadwell, (for children born before the date of the will.)

The gift over, in the event which has happened, is good. *Beachcroft v. Broome* (b), *Hockley v. Mawbey* (c) *Beard v. Westcott* (d); and the persons entitled under it are those only who were *in esse* at the date of the will. *Northey v. Strange*. (e)

(a) *Sed quære*. And see (d) Sugd. *Gilbert* on uses, the cases cited, and *Sugden* on 270.
Powers, 140. 429. (e) 1 P. W. 342. Pre. Cha.

(b) 4 T. R. 441.

470.

(c) 3 Bro. C. C. 82. 1 Ves. j.

403.

[The *Master* of the *Rolls*. That was the case of an immediate devise, not a limitation over.]

1817.
LEAKE

v.
ROBINSON.

If the Court cannot give complete effect to the bequest as the testator intended, then the doctrine of *Cy près* will apply. *Humberston v. Humberston* (a), *Chapman v. Brown*. (b)

[The *Master* of the *Rolls*. Was that doctrine ever held applicable to personal property?]

The decision in *Ellison v. Airey* (c) affords no certain rule for cases of this description, which all depend upon their individual circumstances.

Then, as to the period of vesting, a contingent interest may vest in right, though it does not in possession. *Barnes v. Allen* (d), *Hanson v. Graham* (e), *Kirkpatrick v. Kilpatrick*. (f) Here the testator has given a legal estate to his trustees, whom he has directed to pay to the objects specified; and thus, the gift to those objects is incorporated with the time of payment. The fund is a mixed fund, consisting of real and personal. If it were a direct gift at law, those only would take who are capable, to the exclusion of those who are not capable, and *Æquitas sequitur legem*. Lord Coke (Co. Litt. fo. 100.) recognises the principle laid down in the Year Book, 17 Edw. 3. fo. 29. pl. 30.; and the case in Litt. sect. 352. establishes the doctrine of *Cy près* as applicable to cases of this description — *ut res magis valeat quam pereat*.

Suppose that, on the death of *W. R. Robinson*, one of the children had attained twenty-five, and had filed a

(a) 1 P. W. 392.

(b) 3 Burr. 1634.

(c) 1 Ves. 111.

(d) 1 Bro. C. C. 181. 3

Ves. j. 208. note.

(e) 6 Ves. 289.

(f) 13 Ves. 476.

1817.

LEAKE
v.

ROBINSON.

bill, how could the Court, upon the principle in *Ellison v. Airey*, have refused to give him a share? If the testator had directed payment to be made, first to children *in esse*, and afterwards to unborn children, the Court would have adopted the one and rejected the other class; then why not in the case now before the Court?

In *Baldwin v. Karver* it is said, that the question, who are to take, must depend on the frame of the will, and that that only is to be distributed which is by law distributable. So far, that case is in our favour.

But it is said, there is no authority going the precise length of what we contend for. It is enough, however, if there is no direct authority against us. It may be true that this will be the first decision to that extent. But it is a case which requires a new principle of construction; and that which is best calculated to satisfy the testator's intention will be the rule for the Court to adopt.

As to the residue, — wherever the testator has given it in terms sufficiently comprehensive to pass every thing, if there be in the former part of the will an object that is incapable of taking, or a subject to which the gift cannot apply, that which is so attempted to be given must necessarily fall into the residue; upon the principle that the testator has sufficiently declared his intention not to die intestate as to any part of his property.

Horne, (for the children of Mr. and Mrs. *Mitford*.)

The only material question, as it respects our interest, is that which is raised on the residuary clause. The testator gives to trustees, through whom, and by way of trust only, all the limitations to the children are to operate. This was considered as a circumstance of great

importance in *Braustrom v. Wilkinson* (a), where Your Honor observed, as to the appointment of a trustee for the children, "How could there be a trustee for them "of nothing?" For whom can these persons be trustees, if not for those who take a vested interest? Under the direction for maintenance, the trustees would be justified in applying the entire *produce* of the respective funds towards the maintenance of *all* the children, — not such only as should attain twenty-five, — there being no gift over of the surplus produce, as in the former limitations; an omission which can be accounted for only on the supposition that the testator meant something different from the intention before expressed by him. Again, by the clause of survivorship, the testator adopts the supposition that those who die under twenty-five have yet a vested interest in their shares of the capital. The cases clearly establish that a bequest in these terms may be so controlled by expressions and circumstances as to postpone the possession only, not the vesting; and enough appears from these and other expressions in the residuary clause, to show that such, in the present case, was actually the intention of the testator.

1817.
LEAKE
v.
ROBINSON.

Pepys (for the children of Mr. and Mrs. *Robinson* born after the death of the testator,)

Contended, in like manner, for the legacies having vested in interest, although not in possession; and cited *Booth v. Booth* (b), and *Montgomerie v. Woodly*. (c)

Sir *Arthur Piggott*, in reply.

No authority has been discovered to impeach the rule of law, or even to modify it. It stands unimpaired by any of the cases that have been cited; for none of them

(a) 7 Ves. 421.

(c) 5 Ves. 522.

(b) 4 Ves. 599.

1817.

LEAKE

v.

ROBINSON.

apply to that now before the Court, which is the case of an executory devise. To say that the thing attempted to be given vested in interest before twenty-five, although not actually divisible until then, is only a mode of getting rid of the question altogether, and would be equally applicable if the subject were made payable at the age of fifty instead of twenty-five. This is not a trust, but a direction to pay; and the gift is entirely comprised in that direction. Admitting that the gift over, being on a double contingency, is not therefore void in the event which has happened, yet it is void in itself, as being made to objects who may not attain the age prescribed for their receiving it until more than twenty-one years after the termination of a life *in esse*. To give effect to an executory devise, it *must* be such as will take effect within the limited period. It is not enough that it *may* by possibility do so. It is evident through the whole will that this testator considered the age of twenty-five as that at which it was fit to intrust the children with the dominion over the property intended for them.

The MASTER of the ROLLS.

Feb. 27.

The first point to be determined in this case is, Who are included in the description of brothers and sisters of *William Rowe Robinson*, and of children of Mr. and Mrs. *Robinson*, and Mr. and Mrs. *Mitford* — whether those only who were in being at the time of the testator's death, or all who might come *in esse* during the lives of the respective tenants for life. Upon that point I do not see how a question can possibly be raised. Not only is the rule of construction completely settled, but in this case, I apprehend the actual intention of the testator to be perfectly clear. Indeed, I believe, wherever a testator gives to a parent for life, with remainder to his children, he does mean to include all the children such parent may at any time have. That is not an arti-

Gift to A. for life, remainder to his children. This includes all children, both those born before, and

ficial rule. It is the rule which excludes any of the children that is, and has been called, an artificial rule — namely, the rule in *Andrews v. Partington* (a), and other cases of that description, which excludes all who may be born after the eldest attains twenty-one. The case of *Ellison v. Airey* (b) might have been decided the other way without at all affecting this; for there it was the death of one person that determined what children of another person were entitled to take. It is impossible to impute to this testator an intention to exclude all the children of his grandson, *William Rowe Robinson*, who should not be living at his (the testator's) own death, that grandson having no children at the time the will was made. All the bequests to the children of his daughters are made in as comprehensive terms.

As to the brothers and sisters of *William Rowe Robinson*, I do not apprehend that it is at all necessary to speculate on the question suggested by Mr. Bell, viz. who would, within the meaning of the will, come under the description of brothers and sisters — whether only the children of both parents, or such as one of them might have after the death of the other.

Our question is, whether the testator's bounty was confined to *such* brothers and sisters (in whatever sense these words may be taken) as should be living at his own death. According to the established rule of construction, and what I conceive to have been the actual intention of the testator, all who were living at the time of *William Rowe Robinson's* death must be held to be comprehended in the description.

1817.

LEAKE

v.

ROBINSON.

those born after,
the testator's
death.

The rule of
exclusion is an
artificial rule of
construction.

(a) 3 Bro. C. C. 401.

(b) 1 Ves. 111.

1817.

LEAKE

v.

ROBINSON.

Having ascertained the persons intended to take, the next question is at what time the interests given to them were to vest.

There is no direct gift to any of these classes of persons. It is only through the medium of directions given to the trustees, that we can ascertain the benefits intended for them. The trustees have a discretionary power to apply what portion of the income they think fit, for the support, maintenance, and advancement of the infant legatees. Except in one instance, the testator does not say what is to become of the surplus interest. In the case of the property first given to *William Rowe Robinson* for life, the surplus interest is to accumulate, and to be paid with the capital, either to himself, or to his children, or to his brothers and sisters, when they shall have attained the age of twenty-five.

Where no direction is given as to surplus interest, and the capital is made payable at a future time, the surplus interest falls into the residue.

Interest of a residue goes with the capital; but not the interest of particular legacies.

No direction being given as to the surplus interest of the two moieties of the mortgage money, it will make part of the residue; for, although the interest of residue goes with the capital, that of particular legacies does not, even supposing it be the payment, and not the vesting, that is postponed. It is a mistake to suppose that the trustees are authorised to apply any part of the capital for the benefit of any legatee not attaining twenty-five. It is only in the residuary clause that produce is spoken of, and it is evident that the direction relates only to the income of the property, or of the produce thereof when it should be sold.

As to the capital, there being, as I have already said, no direct gift to the grandchildren, we are to see in what event it is that the trustees are to make it over to them. There is, with regard to this, some difference of expression in the different parts of the will. In some

instances the testator directs the payment to be to such child or children as shall attain twenty-five. In others the payment is to be made upon attainment of the age of twenty-five. In the residuary clause it is, from and immediately after such child or children shall attain the age of twenty-five, that the trustees are to transfer the property. But I think the testator in each instance means precisely the same thing, and that none were to take vested interests before the specified period. The attainment of twenty-five is necessary to entitle any child to claim a transfer. It is not the enjoyment that is postponed; for there is no antecedent gift, as there was in the case of *May v. Wood* (a), of which the enjoyment could be postponed. The direction to pay is the gift, and that gift is only to attach to children that shall attain twenty-five. The case of *Batsford v. Kebbell* (b), was much more favourable for the legatee; for the interest of the fund was given to him absolutely until he should attain the age of thirty-two, at which time the executrix directed her executors to transfer to him the principal for his own use. He died under thirty-two. Lord *Rosslyn* said, "There is no gift but " in the direction for payment, and the direction for " payment attaches only upon a person of the age of " thirty-two. Therefore he does not fall within the " description."

1817.
LEAKE
v.
ROBINSON.

It was supposed that the clauses in the will, where the word *such* is left out, might be construed differently from those in which it is inserted; and that, although where the payment is to be to *such* child or children as shall attain twenty-five, nothing could vest in any not answering that description, yet where the payment is to be to children upon the attainment of twenty-five, or

(a) 3 Bro. C. C. 471.

(b) 3 Ves. 363.

1817.

LEAKE
v.

ROBINSON.

from and after their attaining twenty-five, the vesting is not postponed. If there were an antecedent gift, a direction to pay upon the attainment of twenty-five certainly would not postpone the vesting. But if I give to persons of any description *when* they attain twenty-five, or upon their attainment of twenty-five, or from and after their attaining twenty-five, is it not precisely the same thing as if I gave to *such* of those persons as should attain twenty-five? None but a person who can predicate of himself that he has attained twenty-five, can claim any thing under such a gift.

The Court inclines to construe a residuary clause so as to prevent an intestacy.

Gift of the whole interest is a ground for presuming an intention to vest the capital.

I am aware, however, that although, with regard to particular legacies, this doctrine has not been controverted, yet the case of *Booth v. Booth* (a) may be considered as throwing some doubt upon it, when it is a residue that is the subject of the bequest. There is certainly a strong disposition in the Court to construe a residuary clause so as to prevent an intestacy with regard to any part of the testator's property. With all that disposition, it is evident that Lord *Alvanley* felt that he had a difficult case to deal with. Some violence was done to the words in favour of what he conceived to be, and what in all probability was, the intention. That intention however was collected from circumstances that do not occur in the present case. Both the legatees were adults at the time the will was made. Lord *Alvanley* admits that, if it had been otherwise, it might have made some ingredient in the argument. Then the whole interest was given to them absolutely,—a circumstance which has always been held to furnish a strong presumption of intention to vest the capital, and which is not afforded by a direction for maintenance out of the interest, as was decided in the case of *Pulford v.*

(a) 4 Ves. 399.

Hunter. (a) The legatees might both live to extreme old age, without the event ever happening on which the legacy was made payable. There was no survivorship between them, nor was there any bequest over in the event of the death of both or either; so that intestacy must have been the consequence of death before marriage. In every one of these particulars this case differs from that of *Booth v. Booth*. They agree in nothing, except that the words "from and immediately after" occur in both.

The case of *Booth v. Booth* is therefore not merely no authority for what is contended for by the grandchildren, but it is a strong authority the other way. For it shews that, where there is no gift but by a direction to transfer *from and after* a given event, the vesting would be postponed till after that event had happened; unless, from particular circumstances, you are enabled to collect a contrary intention. For otherwise Lord *Alvanley* would only have had to say, "These words can have no such effect as is ascribed to them. They operate only as a postponement of the enjoyment." Here, interest is not given to children dying before twenty-five. Children attaining twenty-five are to take the whole. There is not even a provision for the case of a child dying under twenty-five, leaving issue. All is to go to those who do attain twenty-five. How is it possible, therefore, that a child can be said to have a vested interest before twenty-five, when it has neither a right of enjoyment, a capacity of transmission, or a ground of claim, until after it shall have attained that age? When the vesting is so clearly and expressly postponed, it is in vain to endeavour to infer from other expressions, used without any reference to that object, that the

1817.

LEAKE
v.

ROBINSON.

Secus, where there is only a direction for maintenance out of the interest.

Where there is no gift but by a direction to transfer "from and after" a given event, the vesting must be postponed till after that event has happened, unless, from particular circumstances, a contrary intention is to be collected.

1817.

LEAKE

v.

ROBINSON.

testator did not conceive himself to have postponed the vesting. That he has unnecessarily provided for survivorship; that he has spoken of *shares* of grandchildren dying under twenty-five, and, in the last proviso, given over the moieties of the residue only in the event of either of his daughters dying without leaving any issue or any children of such issue, — are all of them circumstances that appear to me not at all to affect the question of vesting, as none of these clauses make any new gift to the grandchildren, nor can they alter the terms or conditions of that which had been already made.

Then, assuming that after-born grandchildren were to be let in, and that the vesting was not to take place till twenty-five, the consequence is, that it might not take place till more than twenty-one years after a life or lives in being at the death of the testator. It was not at all disputed that the bequests must for that reason be wholly void, unless the Court can distinguish between the children born before, and those born after, the testator's death. Upon what ground can that distinction rest? Not upon the intention of the testator; for we have already ascertained that all are included in the description he has given of the objects of his bounty. And all who are included in it were equally capable of taking. It is the period of vesting, and not the description of the legatees, that produces the incapacity. Now, how am I to ascertain in which part of the will it is that the testator has made the blunder which vitiates his bequests? He supposed that he could do legally all that he has done; — that is, include after-born grandchildren, and also postpone the vesting till twenty-five. But, if he had been informed that he could not do both, can I say that the alteration he would have made would have been to leave out the after-born grandchildren, rather than abridge the period of vest-

A Testator
having attempt-
ed to give to all
his grandchil-
dren, and also to
postpone the
period of vest-
ing till twenty-

ing? I should think quite the contrary. It is very unlikely that he should have excluded one half of the family of his daughters, in order only that the other half might be kept four years longer out of the enjoyment of what he left them. It is much more probable that he would have said, "I do mean to include all my grandchildren, but as you tell me that I cannot do so, and at the same time postpone the vesting till twenty-five, I will postpone it only till twenty-one." If I could at all alter the will, I should be inclined to alter it in the way in which it seems to me probable that the testator himself would have altered it. That alteration would at least have an important object to justify it; for it would give validity to all the bequests in the will. The other alteration would only give them a partial effect; and that too by making a distinction, which the testator himself never intended to make, between those who were the equal objects of his bounty. In the latter case, I should be new-modelling a bequest which, standing by itself, is perfectly valid; while I left unaltered that clause which alone impedes the execution of the testator's intention in favour of all his grandchildren. Perhaps it might have been as well if the Courts had originally held an executory devise transgressing the allowed limits to be void only for the excess, where that excess could, as in this case it can, be clearly ascertained. But the law is otherwise settled. In the construction of the Act of Parliament passed after the *Thellusson* cause, I thought myself at liberty to hold that the trust of accumulation was void only for the excess beyond the period to which the act restrained it. And the Lord Chancellor afterwards approved of my decision. But there the Act introduced a restriction on a liberty antecedently enjoyed, and therefore it was only to the extent of the excess that the prohibition was

1817.

LEAKE
v.

ROBINSON.

five, which are two objects legally inconsistent, the Court cannot choose between these inconsistent objects, so as to give effect to the one and disappoint the other.

Executory
Devise transgressing the allowed limits is wholly void, — not only for the excess, — independently of the Act.

But *secus* as to executory devises within the scope of the Act.

1817.

LEAKE

v.

ROBINSON.

transgressed. Whereas Executory Devise is itself an infringement on the rules of the common law, and is allowed only on condition of its not exceeding certain established limits. If the condition be violated, the whole devise is held to be void.

Bequests, not to individuals, but to classes of persons, not to be altered, because some individuals of an intended class are incapable of taking, either into particular bequests to the individuals, or by subdividing the class itself.

To induce the Court to hold the bequests in this will to be partially good, the case has been argued as if they had been made to some individuals who are, and to some who are not, capable of taking. But the bequests in question are not made to individuals, but to classes; and what I have to determine is, whether the class can take. I must make a new will for the testator, if I split into portions his general bequest to the class, and say, that because the rule of law forbids his intention from operating in favour of the whole class, I will make his bequests, what he never intended them to be, viz. a series of particular legacies to particular individuals, or what he had as little in his contemplation, distinct bequests, in each instance, to two different classes, namely to grandchildren living at his death, and to grandchildren born after his death.

If the present case were an entirely new question, I should doubt very much whether this could be done. But it is a question which appears to me to be perfectly settled by antecedent decisions, and in cases in which there were grounds for supporting the bequests that do not here exist. In *Jee v. Audley* (a), there were no after-born children — no distinction therefore to be made between persons capable and persons incapable — (all were capable) — no difficulty, consequently, in adjusting the proportions that the capable children were to take, or in determining the manner, or the period, of ascer-

(a) 1 Cox, 324.

taining those proportions. I am asked why the existence of incapable children should prevent capable children from taking. But, in *Jee v. Audley*, the mere possibility that there might have been incapable children was sufficient to exclude those who were capable. It is said, the devise there was future. Certainly; but only in the same sense in which these bequests are future: that is, so conceived as to let in after-born children; which was the sole reason for its being held to be void. Unless my decision on the first point be erroneous, the bequests in this case do equally include after-born children of the testator's daughters, and are therefore equally void.

The case of *Routledge v. Dorril* (a) appears to me to be also an express authority on the point now in question. And I think that the circumstance, that there the will was an execution of a power, was rather favourable than adverse to the Court's making a distinction between the two sets of grandchildren. For it might have been contended that after-born grandchildren were not proper objects of the power, — that the appointment was therefore void *quoad* them, but good *quoad* those who were capable of taking under the power. Whatever might be the value of that argument, it would have no application to the question now before the Court. For, in this case, it could not be said that any one grandchild was, more or less than another, the proper object of the testator's spontaneous bounty; and therefore we have not the line, which the power might have furnished, for making a distinction between the two classes of grandchildren. If, even in such a case, the distinction could not be made, *a fortiori* is it impossible to make it in this.

(a) 2 Ves. 357.

1817.

 LEAKE
 v.
 ROBINSON.

1817.

LEAKE

v.

ROBINSON.

The case of *Blandford v. Thackerell* (a) has no application to the present question. There was no vice or excess in the testator's bequest, which the Court had to cure by excluding some of the objects in whose favour it was conceived. It was a sort of charitable intention for the benefit of children and grandchildren of relations of a specified description. As it was not a future bequest, or by way of remainder, it would, according to the established rules of construction, extend only to children and grandchildren living at the testator's death. Lord *Rosslyn* thought fit, (probably because it was in the nature of a charity,) to extend it to all the objects to whom the testator might legally have extended it — that is, children or grandchildren born during the lives of the different relations. Whether that was, or was not, a correct execution of the particular will, the case has no bearing at all on the point now under discussion. The case of *Wilkinson v. Adam* (b) was referred to, as furnishing an instance of a distinction made between those who were, and those who were not, capable of taking under the same devise. That was merely a question of description, who were or were not included under the denomination of children. If it could be shewn that after-born grandchildren are not entitled to the appellation of grandchildren, there would be a short end of the present case. On the whole, my opinion is, that all the bequests to the grandchildren as classes, (for I have nothing to do with the bequests to individuals,) are wholly void.

With regard to personal estate, whatever is not well given by the will falls

A question has been made, whether the particular bequests thus declared void do or do not fall into the residue. I have always understood that, with regard to personal estate, every thing which is ill given by the will

(a) 2 Ves. 238.

(b) 1 V. and B. 422.

does fall into the residue; and it must be a very peculiar case indeed, in which there can at once be a residuary clause and a partial intestacy, unless some part of the residue itself be ill given. It is immaterial how it happens that any part of the property is undisposed of, — whether by the death of a legatee, or by the remoteness, and consequent illegality, of the bequest. Either way it is residue, — i. e. something upon which no other disposition of the will effectually operates. It may in words have been before given; but if not effectually given, it is, legally speaking, undisposed of, and consequently included in the denomination of residue.

A testator supposes that each part of his will is to take effect, and consequently cannot be said to have any intention to include in his residue any thing that he has before given. I do not see, therefore, how such arguments as might be used in cases of the description of *Roe v. Avis* (a), *Church v. Mundy* (b), and *Welby v. Welby* (c), can be here applicable. The limitations of a particular bequest, and those of the residue, may be quite incongruous; for the testator supposes that each is to have its separate effect. But what eventually turns out to be undisposed of will not the less constitute residue, because some of the provisions contained in the residuary clause may be inapplicable to a case of which the testator did not foresee the existence.

I am of opinion that, in so far as any of the particular bequests are ill disposed of, they fall into the residue. But then, according to what I have already determined, there is no good disposition of the residue itself after the death of the tenants for life, excepting in so far as the

1817.

LEAKE
v.

ROBINSON.

into the residue. It is immaterial how it happens that any part is undisposed of, whether by the death of a legatee, or by the remoteness and consequent illegality of the bequest.

The limitations of a particular bequest, and of the residue, may be incongruous; but whatever turns out to be undisposed of is not the less residue.

(a) 4 T. R. 605.

(c) 2 V. and B. 187.

(b) 12 Ves. 426.

1817.

LEAKE
v.

ROBINSON.

ultimate proviso may operate upon the subject of it. As to that proviso, one half of the residue is placed out of the reach of its operation, by Mrs. *Mitford's* having left children at her death. The consequence is, that, subject to Mr. *Mitford's* life interest, it belongs to the testator's next of kin. The fate of the other half rests in contingency. If Mrs. *Robinson* should die without leaving issue, it is well given over to the children of Mrs. *Mitford*, there being nothing in this bequest to make it too remote; and it being evident that the testator used the words "surviving sister" in the same sense as *other* sister. But if Mrs. *Robinson* shall leave issue, this half also will, at her death, be undisposed of, and divisible among the next of kin.

The question as to the widow's right to share in the property which turns out to be undisposed of, I take to be settled by the case of *Pickering v. Lord Stamford*. (a)

(a) 2 Ves. 272. 581. 3 Ves. 392. 492. 4 B. C. C. 214.

BETWEEN
 THOMAS LOWTEN, and Others, PLAINTIFFS;
 AND
 The MAYOR and COMMONALTY of COLCHES-
 TER, DEFENDANTS.

1816.
 July 11, 15, 19.
 Feb.
 1817.

THE original bill was filed in *Hilary* Term, 1807, by the Defendants, the Mayor and Commonalty of *Colchester*, against *Thomas Lowten*, deceased; and was, by order, dated the 20th of *January*, 1813, dismissed with costs. The Master, by his certificate, dated the 11th of *August*, 1813 (which was regularly filed), stated that he had taxed the costs at £795. 9s. The Defendant *Lowten* died on the 2d of *January*, 1814; and on the 14th of *November*, 1814, a bill of revivor was filed against the Corporation by the executors, of whom the Plaintiff *Lowten* only had proved the will. The defendants not having appeared to the subpoena, a writ of *distringas* issued in *December*; in *Easter* and *Trinity* Terms following two aliases; and in *Michaelmas* Term, 1815, a *pluries distringas*; all which were without effect: and, on the 23d of *March*, 1816, an order was made for a sequestration, which afterwards issued accordingly. On the 13th of *June*, 1816, the Defendants entered an appearance, and on the 1st of *July* (not having then cleared their contempt) gave notice of motion, that the commissioners named in the writ of sequestration might forthwith return to and leave in the record-room of the borough, under the care of the town clerk, all the records, rolls, court and other books, sessions files, indictments, recognizances, deeds, papers and writings seized by them or either of them, or by any person, &c. under their direction, &c. and forcibly taken by them, &c. to their dwellings in *Colchester* aforesaid, and that

Mistake, in title of order for sequestration, by omission of the words "and others," allowed to be rectified by amendment, inserting the words omitted.

Quære, as to the authority of commissioners under a writ of sequestration to seize books and papers, &c. belonging to a corporation.

It appears that the commissioners have authority to break open doors in discharge of their office, by comparison with the proceeding under a commission of rebellion.

1816.
 LOWTEN
 v.
 THE MAYOR,
 &c. OF
 COLCHESTER.

the names of the said commissioners might be struck out of the writ, and that they might stand committed for having knowingly and wilfully abused the process of the Court, as such commissioners.

This notice of motion was followed by another, dated the 6th of *July*, 1816, that the order for a sequestration might be discharged, and the writ which had issued thereon be quashed, for irregularity.

On the 12th of *July*, both motions came on to be heard; and, in support of the latter, the irregularity complained of was, that the order was entitled “Between *Thomas Lowten*, Plaintiff, and the Mayor and Commonalty of *Colchester*, Defendants,” instead of “Between *Thomas Lowten and Others*, Plaintiffs,” &c. : the words “and Others” being by accident omitted.

In support of the former motion, affidavits were filed as to the conduct of the commissioners in seizing the books and papers which were sought to be delivered up, in doing which it appeared that they had caused the door of the room in which they were kept to be broken open, the key having been refused them ; and the books and papers themselves were represented to be of value, and necessary for the due administration of justice. These affidavits were met by others filed by the commissioners in justification of the proceeding complained of, stating offers made by them to the Mayor to return any of the books and papers which might be wanted for corporation purposes, which offers had been in some instances accepted, and performed accordingly ; it being also sworn that the Mayor himself was not privy to the application now made, and that, on being asked, he had said that, if applied to, he should not have given his consent to its being made.

Sir Samuel Romilly, Bell, and Newland, in support of the motions,

As to the first, contended that the order was clearly irregular; and, on the second, referred to *Simmonds v. Kinnaird (a)*, as an authority that commissioners to whom the writ of sequestration is directed on *mesne* process may not, by virtue of it, proceed to seize *choses in action*; and, as to their act in breaking open the door, argued that it was an excess of their power, inasmuch as the sheriff is not authorized to commit such an act for the purpose of seizing the person on *mesne* process. It was also strongly urged on the ground of public inconvenience.

1816.

LOWTEN

v.
THE MAYOR,
&C. OF
COLCHESTER.

July 12.

Wetherell and Spence contra.

The LORD CHANCELLOR,

On the question as to the act of the commissioners, said he had a strong impression that it had been decided that sequestrators might justify breaking locks, on a comparison between a commission of rebellion and sequestration. (b) But, as to their alleged right to seize the books and papers, &c. of a Corporation, he expressed great doubts, and ordered that, as there was now an appearance, those books and papers, &c. should be

(a) 4 Ves. 738., where, however, the point was not decided. See Newland's Practice, p. 19.

(b) See Newland's Pract. p. 14., referring to Gilb. For. Rom. 76. "Though in an attachment on proclamations the sheriff cannot justify breaking doors in executing

such process, yet the commissioners in executing the writ of rebellion may, it seems, use that force, if necessary, to apprehend the Defendant, as they are directed to attach him as a rebel and contemner of the laws."

1816.

LOWTEN

v.

THE MAYOR,
&c. OF
COLCHESTER.

returned subject to such order (if any) by reason of the contempt, as the Court might think proper to make.

Upon the motion to discharge for irregularity, his Lordship expressed an opinion that the sequestration was irregular, but made no order.

July 15.

On coming into Court, the *Lord Chancellor* said, he had determined that the sequestration had issued irregularly; but he mentioned a case of *Bennett v. Button* (a), in which leave was given to the Plaintiffs to amend an error similar to that which had taken place here.

July 19.


In consequence of this intimation, a motion was now made, on the part of the Plaintiffs, that the title of the order of the 23d of *March*, 1816, together with the entry thereof with the Register, might be amended by inserting the words "and others" after the words *Thomas Lowten*; and that the recital in the writ of sequestration might also be amended in the manner expressed by the notice of motion.

Sir *Arthur Pigott*, *Wetherell*, and *Spence*, in support of the motion to amend, relied on the authority of the case mentioned by the *Chancellor*, referring also to *Spearing v. Lynn*. (b)

Sir *Samuel Romilly*, *Bell*, and *Newland*, contra, said that, in the case of *Bennett v. Button*, no proceedings had been had upon the sequestration, and that no instance could be produced of the Court's having interfered to allow such an amendment after process executed. The

(a) 1 Diok. 145. (See the end of this case.) (b) 2 Vern. 376.

process was *ipso facto* void, and it would be attended with very dangerous consequences to afford the protection of the Court to an officer liable to punishment for having acted without any authority.

1816.

 LOWTEN
 v.
 THE MAYOR,
 &c. OF
 COLCHESTER.

[Another objection was made, that there could be no revivor for costs alone: but this was the ground of a demurrer afterwards put in by the Defendants, and argued before *The Master of the Rolls*, sitting for the *Chancellor*, which has been reported *ante*, p. 113.]

All these several motions stood for judgment.

The Demurrer having been disposed of, as above reported, the Plaintiffs now moved that the principal clerk of the subpoena-office, or other proper officer, might be directed to make out a subpoena for payment by the Defendants to the Plaintiff, or bearer, of the sum of £796. 13s. 8d., the amount of costs taxed as aforesaid; or else that the Defendants might be ordered to pay to the plaintiffs, as personal representatives of the late Plaintiff *Lowten*, the sum of £795. 9s., the amount to which the Master had certified that the taxed costs would be reduced, in case the same were paid without a subpoena.

Feb. 20. 1817.

The following minutes of orders on these several motions were afterwards given out by the *Lord Chancellor*.

Grant the motion to amend — The party moving to pay the costs.

Dismiss, as matter of consequence, the motion to quash the sequestration; but, as the party had a right to make that motion till an order to amend was obtain-

1817.

LOWTEN

v.

THE MAYOR,
&c. OF
COLCHESTER.

ed, the party obtaining the order to amend, is to pay the costs of this motion also, though not granted.

The records, &c. having been returned, make no order on the motion relating to them; but, as that motion has other objects, which, I think, should not be granted, I give no costs on that motion.

As to the motion, that the officer should suffer the party to proceed on the subpoena for costs, let that process proceed without further interruption.

But the Plaintiff is to undertake, that, if he recovers his costs under that process, he shall forthwith pay the costs before directed to be paid by him, unless they are first deducted out of these costs.


The case referred to by the Lord Chancellor, of *Bennett v. Button*, appears from the Register's book, to have been as follows:

THOMAS BENNETT, Esq. and Others. PLAINTIFFS.
GEORGE BUTTON, and Others, - DEFENDANTS.

(Reg. Lib. 1748, A. 48.)

Upon opening the matter, it was alleged that the Plaintiffs brought their bill in *Michaelmas*, 1745, against the Defendant, to which bill the Defendant *Button* appeared, but sat out all process of contempt to a sequestration for want of his answer. Afterwards, and before the Plaintiff had put the sequestration in execution against him, he put in his answer; but, refusing to pay the costs of his contempt, the Plaintiffs were advised to put the sequestration in force for recovery of such costs; but, before the sequestration was sent down, they discovered a small mistake in the commission of rebellion, in the title of this cause, which is put only by way of indorsement to such writ; viz. the words "and others" being omitted after the words "*Thomas Bennett, Esq.,*" which said mistake likewise appears with

the entry thereof with the Register; and, the order for the Serjeant at Arms being made out from such commission of rebellion, the same mistake appears to be in the title of the said order, and in the entry thereof; but, in regard the attachment, and attachment with proclamations, were both made out and indorsed "at the suit of *Thomas Bennett, Esq. and Others, Plaintiffs,*" (as appears by the affidavits of *Samuel Roycroft,*) and as the Defendant *Button* hath acquiesced under the said mistake, by putting in his answer to the Plaintiff's bill, it was therefore prayed that the indorsement on the commission of rebellion made out in this cause, together with the entry thereof with the Register of this Court, and the title of the order for the Serjeant at Arms, and likewise the entry thereof, may be amended by inserting the words "and others," after the words "*Thomas Bennett, Esq.*" in the title of this cause; which, upon hearing the said affidavit of *Samuel Roycroft,* and an affidavit of notice of this motion read, and what was alleged by the counsel for the Plaintiffs, his Lordship held it reasonable, and doth order the same accordingly.

1817.

 LOWTEN
 v.
 THE MAYOR,
 &c. OF
 COLCHESTER.

GLADSTONE v. BIRLEY.

[See the statement of the case of "*Birley*, assignee of *Holt*, Bankrupt, v. *Gladstone* and another," in 3 *Maule and Selwyn*, 205.]

ROLLS.
 1816.
 Dec. 6.
 1817.
 March 3.

THE court of K. B. having determined, "that the
 " ship-owners had not a lien upon the goods
 " brought home, for money claimed to be due in respect

Construction of
 clause in a charterparty, where-
 by the parties
 " mutually

" bound themselves, especially the owners the ship and tackle, and
 " the freighter the goods to be taken on board," in a penal sum, "to,
 " the true and punctual performance of every article therein con-
 " tained," not to give to the ship-owners any lien in equity, on the
 goods brought home, either for dead freight, or demurrage.

Only one construction of the clause, at law and in equity.

1817.

GLADSTONE

" "

BIRLEY.

" of goods put on board and reloaded, nor in respect of " dead freight, nor in respect of demurrage," the present bill was filed by the Defendants at law, for the purpose of obtaining a declaration that the ship-owners were entitled to a lien in equity by virtue of the clause in the charterparty.

Sir *S. Romilly* and *Horne*, for the Plaintiffs,

Stated the question to be, whether, the parties having added this special covenant to the usual provisions of a charterparty, the covenant should be taken to be totally inoperative and ineffectual. They said, it does not follow, because a court of law could not give effect to it, that therefore a court of equity is unable to do so. Lord *Ellenborough* would not say that an action might not lie on the covenant for damages (a); and, if such an action might lie, it would go far to determine the right to a lien in equity. In this view, the decision at law did not at all affect the question of covenant.

Wetherell and *Heys*, for the Defendant.

The MASTER of the ROLLS.

The question in this case is, whether the last clause in the charterparty can have any different effect in equity from what it has been determined to have at law? The clause is this — " And, lastly, for the true " performance of every article, matter, and thing herein " contained, the parties hereby mutually bind and " oblige themselves, especially the owners the ship, her " tackle and appurtenances, and *Holt* (the freighter) " the goods and merchandizes to be laden and put on " board the same vessel on the said voyage, each unto " the other and others of them, in the penal sum of

(a) 3 M. & S. 216, 217.

“£3000 sterling, to be forfeited and paid by the party
 “delinquent, to the party observant, to the true and
 “punctual performance thereof.” It has been decided
 at law, that this gave the present Plaintiffs no lien on
 the goods brought home in the ship, either for what is
 called the dead freight, or the demurrage that became
 due by virtue of the covenants on the part of the
 freighter. The ground of the judgment was not, as I
 understand the report, that such a lien might not have
 been contracted for, but that the clause did not contain
 a contract to that effect. Mr. Justice *Le Blanc* says,
 “The clause could not mean to give the ship-owners a
 “lien: if such had been its intention, it might easily
 “have been expressed in a very few words, that the
 “ship-owners should have a right to detain the goods
 “which should be brought home, until all their de-
 “mands under the covenants were satisfied.” Now
 there can be but one right construction of the clause;
 and, if it could be said that the Court of *King’s Bench*
 had ill construed it, this is not a court of appeal in
 which their decision can be corrected.

The Plaintiffs however suppose, that although a court
 of law has said that the clause does not give them a lien,
 a court of equity may say that it gives them what is
 precisely tantamount to a lien, namely, a right to have
 their demand satisfied out of the produce of the goods
 in preference to any other creditors of the bankrupt
 freighter. Putting this clause out of the question, it
 was not contended that Equity gives the ship-owner any
 lien for his freight beyond that which the law gives
 him. There are, to be sure, liens which exist only in
 Equity, and of which Equity alone can take cognizance:
 But it cannot be contended that lien for freight is one of
 them. As to liens on the goods of one man in the
 possession of another, I know of no difference between

1817.
 GLADSTONE
 v.
 BIRLEY.

There are
 liens, which
 exist only in
 equity, and of
 which equity

1817.

GLADSTONE

v.

BIRLEY.

alone can take cognizance.

But lien for freight is not one of them.

The question, whether a tradesman has a lien on goods in his hands for the general balance, or only for so much as relates to the particular goods, is decided on the same grounds at law and in equity. To extend it, the party must shew an agreement, or something from which to infer an agreement.

A court of equity is not bound to find an equitable effect for a clause, because the construction put upon it at law would leave it inoperative.

the rules of decision in courts of law, and in courts of equity. The question that so frequently occurs, whether a tradesman has a lien on the goods in his hands for the general balance due to him, or only for so much as relates to the particular goods, is decided in both courts in the same way, and on the same grounds. To extend the lien, the party claiming it must show an agreement to that effect, or something from which an agreement may be inferred, — such as a course of dealing between the parties, or a general usage of the trade. Lien, in its proper sense, is a right which the law gives. But it is usual to speak of lien by contract, though that be more in the nature of an agreement for a pledge. Taken either way, however, the question always is, whether there be a right to detain the goods till a given demand shall be satisfied. That right must be derived from law or contract. A court of competent jurisdiction has decided that neither law nor contract has, in this case, given any such right. And, without directly contradicting that decision, it is impossible for me to say that the Plaintiffs have a right to be first paid out of the produce of the goods; for, if they had any such right, they would also have had a right to retain possession till they were paid. It was asked, what effect the clause could have if it gave no lien either in Law or Equity. A Court of Equity is not bound to find an equitable effect for a clause, merely because the construction which a Court of Law has put upon it would leave it inoperative. In truth, it has been copied from foreign charterparties, with very little consideration of the effect that might be allowed to it by the law of this country. I think it very probable that, in other countries, it would have the effect of entitling the ship-owner to retain the cargo for every sort of demand that could accrue to him under the charterparty. If that be not the effect of it, I do not see what other it can have.

But, bound as I am by the construction which it has received from a court of law, and conceiving that this is not a case in which Equity can give a lien that does not legally exist, I must dismiss the Plaintiff's bill.

1817.
GLADSTONE
v.
BINLEY.

Bill dismissed without costs.

MILBANK v. REVETT.

March 3—5.
[MASTER of
the ROLLS for
the LORD
CHANCELLOR.]

THIS was a motion on the part of the Plaintiff, tenant in common with the Defendant of an estate in the Defendant's occupation, for a receiver; and the application was founded on affidavit of improper management, and of a reservation of the profits, not amounting to a case of exclusion; which was met by counter-affidavits of a balance due to the Defendant on unsettled accounts, and an agreement for reference to arbitration. The charges of bad management were also denied, and instances produced of interference on the part of the Plaintiff.

Motion by tenant in common for a receiver against his co-tenant in possession, refused, it not amounting to a case of exclusion.

Wingfield, in support of the motion, referred to *Evelyn v. Evelyn* (a), where a receiver was appointed of an undivided estate.

Stephen, contra, insisted that the application was not of course, and mentioned *Street v. Anderton* (b), where a tenant in common in possession was, under circum-

(a) 2 Dick. 800.

(b) 4 Bro. 414.

1817.
 MILBANK
 v.
 REVETT.

stances of absolute exclusion, ordered to give security only for payment of the proportion of rent to his cotenant; otherwise, a receiver to be appointed.

Wingfield in reply.

Street v. Anderton is an authority for the present application. It is of course, between partners, that if one in possession will not give security to the other, a receiver shall be appointed. *Peacock v. Peacock.* (c)

The MASTER of the ROLLS said, the question depended entirely on the fact whether the affidavits did, or did not, make out a case of exclusion; and on the following day observed that the affidavits were insufficient to ground such an application, adding that it requires a case of the strongest misconduct on the part of a managing partner to obtain a receiver.

(c) 16 Ves. 49.

[MASTER of the
 ROLLS for the
 LORD CHAN-
 CELLOR.]
 March 3—5.

WILSON and Another, - - PLAINTIFFS;
 AND
 WETHERHERD and Others, DEFENDANTS.

After a Decree to account, an Injunction granted, on the application of the Defendant, to restrain the Plaintiff from proceeding at

THE Bill, which was filed in May, 1814, sought to recover the arrears of certain annuities granted by the Defendant *Wetherherd* to the Plaintiff *Wilson*.

In consequence of some mistake between this Defendant's clerk in court and a clerk of his solicitor, no appearance was entered for the Defendant, and his

Law in an action commenced by him pending the Suit in Equity.

answer, though prepared, and approved by him, was not filed, before the 24th of *December*, 1815, when the bill was taken *pro confesso* against him.

1817.
WILSON.
v.
WETHERHERD.

On the 1st of *December*, 1816, the Defendant moved to discharge that order. *The Master of the Rolls* refused the application; but on His Honour's suggestion, the Plaintiffs consented that the Defendant should be at liberty to file an answer. His answer was filed accordingly on the 16th of *December*, and, on the 18th, the cause was heard, and a decree made in favour of the Plaintiffs.

In the *July* preceding, notwithstanding the pendency of the former suit, the Plaintiff *Wilson* had commenced an action in *K. B.* for the arrears of the same annuities; in which an interlocutory judgment was signed in *Hilary* Term, and the Defendant was arrested and confined a prisoner in *York Castle* for the debt.

The usual motion to put the Plaintiff to his election was not made; and the Defendant now moved that the Plaintiff might be restrained by injunction from proceeding at law against the Defendant on the action so commenced.

Swanston, in support of the motion, referred to *Mocher v. Reed* (a), as an authority for the order sought to be obtained, on the ground that, after a decree to account, both parties become actors, and the Defendant has a right to the interference of the Court to restrain the Plaintiff from proceeding at law, as much as if a bill were actually filed by him.

(a) 1 Ball & B. 318. And see *Boyd v. Heinzelman*, 1 Ves. & B. 381. *Mills v. Fry*, 3 Ves. & B. 9.

1817.

WILSON

v.

WETHERHARD.

Dowdestell, contra.

The only remedy to which the Defendant is entitled, is to put the Plaintiff to his election; and if notice were now given of such a motion, it would put the Plaintiff on enquiring which is most for his benefit.

The MASTER of the ROLLS expressed a doubt as to the principle of the practice contended for; but on a following day granted the injunction on the authority of the case cited.

March 8.

CALDWALL v. BAYLIS. (a)

Injunction
against permis-
sive waste.

AN Injunction was granted in this case "to restrain
" the Defendant, his agents, servants, and work-
" men, from cutting down or felling timber or timber-
" like trees, except for repairs of buildings on the pre-
" mises, and from committing *or permitting or suffering*
" any further or other waste, until answer, or further
" order;" upon affidavits to the effect following.

Mary Baylis (the Defendant's late wife) being seised in fee simple of the premises, which were copyhold, made her will in pursuance of a power vested in her by a surrender made by her husband and herself to the use of her will, and thereby devised to her husband (the Defendant) for his life, "he keeping the interest of
" a certain mortgage charged on the premises paid,
" and keeping the buildings in tenantable repair,

(a) Reg. Lib. 1816. A. fo. 551.

“and not felling any timber except for such repairs.” After his decease she gave the same premises to her nephew *Richard Ballard*, his heirs, &c. (in case he should then be living,) but, if he should die in the life-time of the Defendant, then to the Plaintiffs, as tenants in common.

1817.

 CALDWALL
 v.
 BAYLIS.

The Testatrix died in 1796, upon which the Defendant entered into possession, but instead of keeping the premises in repair, permitted the same to go into decay during the life of *Ballard*, who had intended to commence proceedings against him both at law and in equity in consequence of his neglect, but desisted upon his promise to repair forthwith. In 1808 *Ballard* died, and the Defendant having neglected to perform his promise either during his life-time or since his death, the buildings upon the premises, (consisting of a farm-house and cottages, three barns, a stable, and other edifices,) grew ruinous for want of the needful repairs; which, by an estimate made on behalf of the Plaintiffs in 1816, amounted to £157 and upwards. The affidavit went on to state the information and belief of the Plaintiffs that the Defendant had, both before and since the death of *Ballard*, “by himself, his servants, agents, and workmen,” cut down timber to a great amount in value, and carried the same off from the premises, or converted to implements of husbandry and other articles for the use of himself and his tenants, employing a very inconsiderable part in or towards the needful repairs, “thereby committing or suffering great waste and great damage to the inheritance,” and that he threatened “to commit or suffer further and other waste,” &c. This affidavit by the Plaintiffs was accompanied by another, by the surveyor whom they had employed to make the estimate, as to the ruinous state of the buildings, and also as to his having been prevented by the tenant re-

1817.

CALDWALL

v.

BAYLIS.

siding on the estate from surveying the whole of such buildings.

The Defendant had appeared, but had not put in his answer.

Hart and *Heys* in support of the motion for an injunction.

ROLLS.

1816.

May 20, 21, 28.

1817.

March 17.

SPEER v. CRAWTER and Others.

Bill by Lord of the Manor of *W.* against the Lord of

THE circumstances of this case, as represented by the bill, are detailed in the report, in 17 *Vesey*, 216.

the adjoining Manor of *I.* (who was also lessee of the manor of *W.*) and against Commissioners under an Act for inclosing lands within the manor of *I.*, alleging confusion of boundaries arising out of the union of possession of the two manors; and that the Defendants were preparing, in combination together, to set out a boundary of the manor of *I.* which would include lands belonging to the manor of *W.*, prayed a commission to set out the land lying within, and being part and parcel of, the manor of *W.* The answer of the Defendant, Lord of the Manor of *I.*, set out boundaries, referring to perambulations made previous to the union of possession; and, the lease having expired since the filing of the bill, and it not being established in evidence that there was any confusion of boundaries occasioned by default or neglect of the owners of *I.* while lessees of *W.*, the bill was dismissed, with costs as against the Commissioners, but without costs as against the other Defendant.

Jurisdiction, as to granting commission to ascertain boundaries, deduced from the writ *de rationabilibus divisis*, or that, *de perambulatione faciendâ*. Consent, the ground upon which it was first exercised; then upon the application of a party, having an equitable claim, and no objection made. But a Court of Equity will not interfere between two independent proprietors, to force either to have his right so determined.

The demurrers being over-ruled, answers were put in; the substance of which, and of the evidence produced at the hearing, will be sufficiently collected from the judgment pronounced by His Honour, *The Master of the Rolls*.

1816.
SPEER
v.
CRAWTER.

The lease to *Taylor*, of the manor of *Weston*, having expired since the decision respecting the demurrers, the only question now was upon that part of the prayer of the bill which was, that a commission might issue to set out the land which lay within, and was part of, that manor.

Sir S. Romilly and *Wilson*, for the Plaintiff,

As to the jurisdiction of the Court to grant a commission to ascertain boundaries of manors, in cases where the right to the soil itself is in question, cited *Lethicullier v. Lord Castlemain* (a), *The Bishop of Durham's case* (b), *Hughes v. Græme* (c); as to the obligation of a tenant to preserve boundaries, *The Attorney General v. Fullarton* (d); and distinguished the cases of *St. Luke's v. St. Leonard's* (e), and *Wake v. Comyers* (f), where the right to the soil was not in question.

Martin, Bell, and *Spence*, for the Defendant *Taylor*, contended that the cases in which such relief had been granted were few in number, and those of confusion, attended with circumstances of wilful default and misconduct; while the general principle to exclude the jurisdiction was established by a string of authorities. And they referred to *The Duke of Leeds v. The Earl of*

(a) 1 Dick. 46.

(d) 2 Ves. and B. 263.

(b) 12 Vin. Ab. 268. (Tit. Evidence, x. b. pl. 29.)

(e) 1 Bro. 40. 2 Anstr.

386 — 395.

(c) Ibid.

(f) 2 Cox. 360.

1816.
 SPEER
 v.
 CRAWTER.

Strafford (a), Rouse v. Barker (b), Atkyns v. Hatton (c), Mayor of York v. Pilkington. (d) It was not easy to collect the grounds of Lord *Thurlow's* decision from the incorrect note of the case of *St. Luke's* and *St. Leonard's* parishes.

Hart and Barber, for the Defendants the Commissioners.

Sir *S. Romilly*, in reply.

It is one of the common heads of equity to grant a commission in case of confusion of boundaries, and so stated by Lord *Redesdale. (e)* See also the cases collected in 4 *Viner*, 422. (*Tit. Chancery, D. a. 10, &c.*) *Hungerford v. Goring (f)* admits it to be the common proceeding where no remedy can be had at law; and no authority can be produced where it is put in question. The doctrine in *Wake v. Conyers* was a mere extrajudicial opinion — a doubt entertained by Lord *Northington* in consequence of the little knowledge of equity he at that time possessed, and his general prejudice against it. Lord *Thurlow* does not question it in the case of the two parishes. In *The Attorney-General v. Fullarton*, the present Lord Chancellor says expressly, that he does not proceed upon the ground of fraud.

At all events, it is a case in which we are entitled to costs.

The MASTER of the ROLLS.

March 17.
 1817.

This Bill is filed by the Plaintiff, as Lord of the Manor of *Weston*, against Mr. *Taylor*, as Lord of the

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| (a) 4 Ves. 180. | (d) 1 Atk. 282. |
| (b) 3 Bro. 180. Bunb. | (e) Mitf. Plead. 94. |
| 251. | (f) 2 Vern. 38. |
| (c) 2 Anstr. 386. | |

adjoining manor of *Imworth*, and against *Crawter* and *Neale*, who are the Commissioners under an Act for inclosing lands within the last mentioned manor, and the manor of *Kingston upon Thames*. At the time of filing the bill, the manor of *Weston* was in lease to Mr. *Taylor*. The Plaintiff alleged that the Commissioners, under pretext of carrying the Inclosure Act into execution, were proceeding, in combination with Mr. *Taylor*, to set out a boundary of *Imworth*, which would include lands really belonging to the manor of *Weston*; but that the subsisting lease prevented him from bringing any action against the Commissioners for any trespass they might commit on his manor of *Weston*.

1817.
SPEER
v.
CRAWTER.

The first part of the prayer of the bill therefore was, that the Plaintiff, notwithstanding the lease, might be at liberty to bring one or more actions of trespass, as he might be advised, against the Defendants *Crawter* and *Neale*, and of ejectment, or such action as he should be advised, against the Defendant *Taylor*, to recover to the Plaintiff's manor of *Weston* the land encroached upon in *Weston Green*, and *Weston or Ditton Common*; or that issues might be directed to try his right to the premises in question. Before the cause came on to be heard, the lease had expired, and the Plaintiff consequently did not need the assistance of this Court to enable him to institute any legal proceedings for the assertion of his rights. But another part of the prayer of his bill was, that, if necessary, a Commission might be directed to issue, to set out the land which lies within and is part and parcel of the said manor of *Weston*. And at the hearing, the question discussed was, whether the Court ought or ought not to award such a commission. It appears that both manors had originally belonged to the Crown. That of *Imworth* had been sold or granted away many years since; the answer says, about 1630. *Weston*

1817.
 SPEER
 v.
 CRAWTER.

manor remained in the Crown till the Plaintiff's father purchased it in 1801. In 1752, the manor of *Imworth* belonged to the *Onslow* family; and in that year *Arthur Onslow* obtained a lease from the Crown of the manor of *Weston*, which lease was renewed and was subsisting in 1794, when the Defendant *Taylor* purchased the manor of *Imworth*, and took an assignment of the lease of the manor of *Weston*. The bill alleges, that by this union of possession of the two manors in the same persons, as owners of the one and lessees of the other, the court rolls and other muniments of the manor of *Weston* have passed into the hands of the proprietors of *Imworth*, and have not been kept distinct, as they ought to have been; that the courts of the manor of *Weston* have been neglected to be holden, and the tenants have been transferred to the rolls of the manor of *Imworth*; and that the boundaries of the said manors, where they respectively joined or lie intermixed, have not been preserved, and cannot now, without the aid of this Court, be defined or ascertained.

The answer denies that the rolls of the two manors have been blended, except that, in one instance, an entry was by mistake made in the rolls of *Imworth*, of a license to inclose some land that lay in the other manor. It denies that the manors lie intermixed, or that the boundaries are incapable of being ascertained. It asserts, on the contrary, that the boundaries are well ascertained and defined, and states with particularity what those boundaries are.

To prove that the boundaries are in fact confused, and incapable of being with any certainty distinguished, the Plaintiffs have produced various ancient documents, which show that, even at a distant period, there had been a great uncertainty with respect to the boundaries

of the two manors. And a letter has been read, written by the Defendant *Taylor* in 1801, in which he distinctly admits, that the manor of *Weston* is so blended and united with the manor of *Imworth*, that no boundaries, as far as he knows, have ever been ascertained, and he did not think it possible to make any particular survey of the *Weston* manor. What Mr. *Taylor* says to that is, that he had not then examined, though they were in his possession, two perambulations, (one made in 1720, and another in 1729,) which now enable him distinctly to specify the boundaries. This is but an unsatisfactory explanation. As lessee, Mr. *Taylor* ought to have furnished all the information in his power to those who were acting on behalf of the crown, and should for that purpose have carefully examined all the muniments in his possession. Considering what appears in the ancient documents concerning the uncertainty of the boundaries and contents of these manors, it is not possible that such uncertainty could be removed by perambulations made in 1720 and 1729.

The old documents go a great way to show that, whatever the true boundaries may be, they could not anciently have been such as are insisted on by Mr. *Taylor's* answer.

On the other hand, it is not shown that the confusion has been occasioned by the acts or the neglect of the owners of the manor of *Imworth*, while they sustained the character of lessees of the manor of *Weston*. On the contrary, it appears by the old documents, that an uncertainty about the boundaries existed long before the year 1752, when the lease to Mr. *Onslow* was made. The Defendant relies on perambulations, or presentments, made in 1720 and 1729, as ascertaining the boundaries of *Imworth*. Whether they truly described

1817.
 SPEER
 v.
 CRAWTER.

1817.
 SPEER
 v.
 CRAWTER.

the boundaries or not, they show what the claim of the owners of *Imworth* was, many years before they became lessees of *Weston*. If, therefore, any portion of what originally belonged to the manor of *Weston* was included within these boundaries, it was not by unity of possession that an opportunity was afforded for the encroachment. In this state of things, it has been contended, that the Court has no jurisdiction to issue a commission for settling the boundaries of the two manors. It becomes, therefore, necessary to enquire, by what principles the Court is guided in granting commissions of this description.

There are two writs in the register concerning the adjustment of controverted boundaries, from one of which it is probable that the exercise of this jurisdiction by the Court of Chancery took its commencement.

The first is the writ *de rationabilibus divisis* (a). The other the writ *de perambulatione faciendâ* (b).

(a) *Præc.* Quodd justè et in propriâ personâ tuâ accedas sine dilatione facias esse rationabiles divisas inter terram *Edmundi B.* in *C.* et terram *Simonis* de *K.* in *S.*, sicut esse debent et solent: unde idem *B.* queritur quodd præd. *S.* plus inde trahit ad feodum suum, quam ad ipsum pertinet habend. Ne amplius inde clamorem, &c. prq defectu recti. *Regula.* Breve de rationabilibus divisis semper debet fieri inter villas diversas. — Reg. Brev. 157. b.

(b) *Præc.* Quodd assumptis tecum xii discretis et legalibus militibus de comitatu tuo, in propriâ personâ tuâ accedas ad terram *A.* de *B.* in *N.* et terram *C.* de *D.* in *E.* et per eorum sacramentum fieri fac perambulationem inter terram ipsius *A.* in *N.*, et terram ipsius *C.* in *E.*, ita quodd perambulatio illa fiat per terras, metas, et divisas: quia præd. *A.* et *C.* posuerunt se coram nobis in perambulationem illam. Et scire facias justitiariis nostris apud *W.* tali die, vel ad primam assisam sub sigillo tuo et sigillis quatuor legalium militum ex illis qui perambulationi illi interfuerint, per quas metas

Both Lord *Northington* and Lord *Thurlow*, without referring to this writ or commission as the origin of the jurisdiction of the Court, have yet expressed an opinion, that consent was the ground on which it had been at first exercised. The next step would probably be to grant the commission on the application of one party who showed an equitable ground for obtaining it; such as, that a tenant or copyholder had destroyed, or not preserved, the boundaries between his own property and that of his lessor or lord. And, to its exercise on such an equitable ground, no objection has ever been made. But, on what principle can a Court of Equity interfere between two independent proprietors, and force one of them to have his rights tried and determined in any other than the ordinary legal mode in which questions of property are to be decided? In some cases, certainly, the Court has granted commissions, or directed issues, on no other apparent ground than that the boundaries of manors were in controversy. In *Wake v. Conyers* (a), however, Lord *Northington* held, that it was in the case of manors, that the exercise of the jurisdiction, which (he says) "had been assumed of late," was peculiarly objectionable. He refused either to grant a commission or to direct an issue.

So did Lord *Thurlow* in the case of two parishes (b).

et divisas perambulatio illa facta fuerit. Et habeas ibi nomina militum et hoc breve, &c.

Regula. Breve de perambulatione faciendâ, semper fit de consensu partium, inter diversas villas in uno comitatu vel diversis. Et partes inter quas fiet perambulatio venient in cancellariam, et concedent quodd perambulatio

fiet inter terras suas, et debet cognitio illa irrotulari. Vel potest breve *dedimus potestatem* dirigi alicui magnati, ad recipiendam cognitionem partium in hac parte, vel potest fieri *dedimus potestatem* inde. — Reg. Brev. ib.

(a) 2 Cox, 36.

(b) *St. Luke's v. St. Leonard's*, 2 Anstr. 386—395.

1817.

SPEER

v.

CRAWTER.

1817.

SPEER

v.

CRAWTER.

The circumstance of confusion of boundaries constitutes, *per se*, no ground for the interposition of the Court.

In the same case of *Wake v. Conyers*, Lord Northington says, that, in his apprehension, this Court has simply no jurisdiction to settle the boundaries even of land, unless some equity is superinduced by act of the parties. I concur in that opinion, and think that the circumstance of a confusion of boundaries furnishes, *per se*, no ground for the interposition of the Court.

The present bill, in point of statement, laid a sufficient ground for such interposition, for it alleged the confusion to have taken place by the fault, or the neglect, of the owners of *Imworth*, while lessees of *Weston*. But that is not only not made out, but it is disproved. If the ancient boundaries of the two manors be really unknown, as the Plaintiff alleges they are, how are commissioners to ascertain them? or what is to be done if they cannot be ascertained? When it is through the default of a tenant or copyholder, that boundaries are confused, the Court provides for the case of its being impossible to ascertain them, by directing so much of the Defendant's own land to be set out, as shall be equal to the quantity originally granted or leased. But, because the owner of a manor can no longer find all the wastes that may once have belonged to it, he is not to have the deficiency made good out of his neighbour's estate. Conceiving that this is not a case in which the Court has any jurisdiction to interfere, I must dismiss the bill with costs, as against the commissioners, and without costs as against Mr. *Taylor*.

1817.

ROLLS.
March 13.

ALEXANDER FRASER TYTLER, commonly called LORD WOODHOUSELEE, CAROLINE CRAIG, an Infant, (by her next friend,) and JAMES KER, on behalf of himself and all the other Legatees named in the Will of SIR J. H. CRAIG, deceased, - - PLAINTIFFS;

AND

SIR HEW DALRYMPLE, JAMES HENRY HOUSTON, and JAMES WILKIE,

DEFENDANTS.

SIR JAMES HENRY CRAIG, by his will, dated May 7th, 1811, among several legacies to different persons therein named, gave "to the children of the late *Charles Ker*, who should be living at the time of his (the testator's) decease, £2000, to be equally divided among them."

Legacy "to the children of the late C. K. who shall be living at (testator's) decease." C. K. being dead at the date of the will, leaving illegitimate children, (of whom three were living at the death of the testator,) and not having, at the date of the

By the affidavit of *Mary Ker*, widow, in support of a state of facts laid before the Master to whom the cause stood referred, it appeared that *John Charles Ker* (in the will called *Charles Ker*,) intermarried with the deponent in 1792, and that after such marriage, the said *J. C. Ker* had not any child born, but that before the marriage, he had cohabited with the deponent for many years, and had by her five children, (of whom the

will, nor having ever had, any legitimate children, the three illegitimate children were held to be entitled.

Where there are not, nor ever were, nor can by possibility be, any persons strictly answering the description of children, it is necessary to resort to evidence *dehors* the will, for the purpose of finding whether there were any who had acquired the reputation of children; and it is possible for illegitimate children to acquire that reputation.

1817.

Lord Wood-
HOUSELEE
v.
DALRYMPLE

three claimants of this legacy of £2,000 were the only children living at the time of the testator's decease,) who had all been baptized in the parish church of *Clifton*, as the children "of *John Charles* and *Mary Ker*," shortly after their respective births.

The affidavit went on to state, that the deponent had been informed, and believed, that the testator knew and was well acquainted with the circumstances of the family of the said *J. C. Ker*; that the three surviving children were the persons designated by him, in his bequest to "the children of the late *Charles Ker*," and that two of them were personally known to the testator. It also stated, that *J. C. Ker* never had any other child or children, to the knowledge or belief of the deponent, than those before mentioned and described. It further appeared, that *J. C. Ker* was lost at sea within a short time after his marriage to the deponent.

The master disallowed this claim, on the ground of its appearing that the marriage did not take place till several years after the births of the claimants; and the question now came before the Court, upon an exception to the Master's report.

Sir S. Romilly and *Collinson*, for the report,

Cited *Swaine v. Kennerly* (a), and *Beachcroft v. Beachcroft* (b), establishing the principle that illegitimate children can only take by reputation; and argued that the testator in this case was aware of the principle, having in another part of the will, given to one of the children, describing her so as to identify the person, which was evidence of his understanding as to this particular bequest.

(a) 1 Ves. & B. 469.

(b) 1 Madd. 430. .

Shadwell and Pemberton, in support of the exception.

In a case circumstanced as the present, there can be no question as to the understanding of the testator.

The cases are of three sorts. *First*, where the contest is between legitimate and illegitimate children; as *Cartwright v. Vawdry*, (a) &c. *Secondly*, where there are only illegitimate children living, but there is a possibility of legitimate children coming in *esse*; as *Godfrey v. Davis* (b), *Wilkinson v. Adam* (c), and *Beachcroft v. Beachcroft* (d), &c. where evidence will be admitted of the having acquired a reputation as *children*. *Thirdly*, where, as in the present case, the parent being dead at the time of the testator's making his will, there was no possibility of future legitimate children. In such a case, as there can be no uncertainty with regard to intention, there can be no ground of enquiry.

The MASTER of the ROLLS, adverting particularly to the circumstance alleged by the affidavit, that the testator was apprised of the state of Mr. Ker's family at the time of making his will, said that this constituted it a new case, and took time to consider.

The MASTER of the ROLLS.

It struck me, on a general recollection of the authorities, that this case differed from any in which the Court had decided against the claim of illegitimate children; and, upon a reference to the cases, I am confirmed in that opinion. In all of them, legitimate children were either actually in existence, or capable of coming into existence, at the time of making the will.

(a) 5 Ves. 534.

(b) 6 Ves. 43.

(c) 1 Ves. & B. 422.

(d) 1 Madd. 433.

1817.

Lord Wood-
HOUSELEE

v.

DALRYMPLE.

March 17.

1817.

Lord Wood-
HOUSELEE

v.

DALRYMPLE.

In *Cartwright v. Vawdry* (a), the question asked by Lord Rosslyn was, How can I put upon the will the construction the Plaintiff desires, when there are lawful children? It is impossible, in a court of justice, to hold that an illegitimate child can take equally with lawful children, upon a devise to children.

In *Godfrey v. Davis* (b) Mr. Harwood was alive at the date of the will, and might have a legitimate child, as he afterwards actually had.

In *Harris v. Stewart* (c), and *Swaine v. Kennerly* (d), there were legitimate children in existence. Even in *Wilkinson v. Adam* (e), and *Beachcroft v. Beachcroft* (f), there was a possibility of future legitimate children, though, under the particular circumstances of those cases, the illegitimate children succeeded in establishing their claim. But here the death of the parent is noticed in the will itself. It was, therefore, at the time of making the will, impossible that there should be any legitimate child in future. With the knowledge of this impossibility, the testator makes certain persons the objects of his bounty, under the description of "the children of Charles Ker." What persons answer that description must necessarily be matter of extrinsic evidence. If there had been any legitimate children, they would have been understood to be the persons designated. But there is all the evidence which a negative admits of, that Charles Ker never had any legitimate children. His brother, and his sister, and his widow, all swear that they never heard of his being more than once married; and, subsequently to his marriage, he had no children.

(a) 5 Ves. 534.

(d) 1 Ves. & B. 469.

(b) 6 Ves. 43.

(e) 1 V. & B. 422.

(c) Cited 1 V. & B. 434.

(f) 1 Madd. 433.

1817.

Lord Wood-
HOUSELEE
v.
DALRYMPLE.

It being then ascertained that there are not, that there never were, and that there could not in future be, any persons properly answering the description of children, we are driven to enquire whether there were any persons in existence who had acquired the reputation of children; and we have evidence that there were such at the date of the will. They then must of necessity be the persons meant by the testator. They answer the description, and no other persons ever could answer it. In this respect, the case is stronger in favour of the illegitimate children than either *Wilkinson v. Adam*, or *Beachcroft v. Beachcroft*.

Those cases which have laid down the rule most strictly, admit that it is possible for illegitimate children to acquire a reputation as children: and to that extent evidence *dehors* the will must be received. In others, the courts have gone further, and have admitted circumstances to show the testator's intention in favour of the particular individuals. In this case the testator certainly meant to give to somebody, and there are no others to whom he could mean to give by the description he has used. Therefore the present claimants are entitled.

Exception allowed.

1817.

March 17.

[The MASTER
of the ROLLS
for the
CHANCELLOR.

FILDES v. HOOKER.

On a bill by
vendor for
specific per-
formance of an
agreement to
take a lease for
twenty-one
years, at rack-
rent; the
Master having
reported in
favour of the
title shown by
the abstract,
and an excep-
tion being
taken to the
report; the
question was,
whether, where
the agreement
is silent, the
vendor of a
leasehold inter-
est is not
bound to pro-
duce the title of his lessor? And the exception was allowed.

THE bill was for a specific performance, by the
defendant, of the agreement contained in the fol-
lowing memorandum.

“ Memorandum of agreement made this twelfth day
“ of *November*, 1810, between *John Fildes* of the one
“ part, and *Benjamin Hooker* of the other part. The
“ said *John Fildes* agrees to let the house, No. —, on
“ the west side of *Crescent Place, Tavistock Square*,
“ next the Duke of *Bedford's* private road, for the
“ term of twenty-one years, at the yearly rent of £120.
“ The said *Benjamin Hooker* agrees to accept a lease on
“ the above terms, and to insure the premises from fire
“ to the value of £1,100; and the said *John Fildes*
“ agrees to put the house in a state of tenantable
“ repair.

“ The rent to commence at *Christmas Day* next
“ ensuing.”

When the Cause came on, it was referred to the
Master to see whether the Plaintiff could make a good
title, and whether a good title, or abstract of a good title,
was delivered, or shown, according to the agreement.

Whether the interest contracted for be freehold or leasehold, for a
long term of years, or a short lease at rack-rent, the party who
comes for a specific performance should be prepared to show, that
he is able to give what he seeks to compel the other to take.

Quære, where the length of possession under the original lease has
been such as will suffice to raise a presumption of title.

The Master reported, that the Plaintiff had laid before him an abstract of his title, and, upon perusal thereof, he was of opinion that the Plaintiff could make a good title, upon a lease for the term of twenty-one years, according to the agreement.

1817.
FILDES
v.
HOOKER.

To this Report, the general Exception was taken, "that the Master ought to have certified that the Plaintiff could not make a good title."

The abstract referred only to a lease for ninety-nine years, dated *July 21st, 1809*, from the *Skinner's Company* to *Burton*; an under-lease from *Burton* to *Kerry*, dated *29th September, 1809*; and a lease from *Kerry* to the Plaintiff, dated the *29th of November, 1810*, for ninety-five years and three-quarters, wanting ten days.

Sir Samuel Romilly, Wingfield, and Sugden, in support of the exception.

It has been again and again decided, that a lessee is a purchaser, *pro tanto*, both at law and in equity. The first case, in which the point, as to the right of the purchaser of a leasehold interest to call for the production of the lessor's title, is mentioned, is *Keach v. Hall* (a), where the right seems to have been taken for granted by Lord *Mansfield*. And see *Waring v. Mackreth* (b), *White v. Foljambe* (c), *Deverell v. Lord Bolton* (d). In the latter case, the Lord Chancellor says, "the proposition, that the vendor of a leasehold interest cannot produce his lessor's title, is not to be represented as universally true. I know instances to the contrary. The vendor ought, therefore, where he sells with that restriction, to describe that it is the

(a) Dougl. 21.

(c) 11 Ves. 337.

(b) Forr. Exch. Rep. 129.

(d) 18 Ves. 505.

1817.
 FILDES
 v.
 HOOKER.

“ interest he has that is to be sold.” This is the true distinction. It is impossible for a Court of Equity to assist a vendor, who does not choose to describe that which he offers to sell; and this is not confined to a Court of Equity, but holds good at law also. (a) The title must be clear and plain, and accord with that which is agreed to be given.

See also *Collet v. Thomson* (b), *Temple v. Brown*. (c)

Hart and Roupell, for the Master’s report.

The Lord Chancellor’s doctrine, in the cases referred to, merely amounts to this; that every case must depend on its own particular circumstances, with reference to this question of the production of the lessor’s title; and the Lord Chancellor very properly qualifies the generality of the proposition, by confining it to the cases to which it is strictly applicable. Thus, he denied the doctrine advanced by Lord *Rosslyn*, in the case of *Pope v. Simpson*. (d) There must in all cases be reasonable evidence of the title to grant the original lease, except where it is expressly covenanted that no such evidence shall be required. The abstract question was before the Court on the hearing, and the decree was expressly framed, so as to be without prejudice. It has never yet been decided: and it is now fairly at issue in the present cause. If once established as a general rule, there is an end to all assignments of leasehold interests. No landlord will bind himself to produce his title to every assignee of the original lease, or to every under-tenant of the estate, at the risk of such consequences as those sustained by the *Corporation of Newcastle* (e). True, a lessee is, to some extent, a purchaser. He is a purchaser in consideration of rent and covenants.

(a) See 1 Taunt. 430.

(c) 6 Taunt.

(b) 3 Bos. & Pull. 246.

(d) 5 Ves. 145.

Sugd. Vend. & Purch. 194.

(e) In 8 Ves. 141.

But what danger does the purchaser of a lease at rack-rent incur, in comparison with that of the purchaser of a freehold estate, from which he cannot be sufficiently protected by the lessor's covenants? These are all that is necessary for his protection. *Browning v. Wright. (a)*

1817.
FILDES
v.
HOOKER.

Wingfield in reply.

A person advertising a leasehold estate for sale, should fairly apprise the party with whom he meant to contract, of the interest which he has to dispose of. The very argument, which is founded on the danger to a landlord from producing his title, implies the risk to a lessee from its non-production.

The MASTER of the ROLLS.

I should regret much to be under the necessity of determining some points that have been touched upon in argument in this case. I should hesitate long before I decided that an owner of real property does, by contracting to grant a lease, become bound to show a title to the estate out of which it is to be granted. But it is quite a different question, whether one who is unable, or thinks it inexpedient, to show a title to the property to be leased, shall have a right to compel another to take a lease of such property, without any other security for the enjoyment of it than the personal covenants into which a lessor commonly enters. There are many cases in which this Court will not interfere in favour of a Plaintiff, except upon terms which could not be directly enforced against him in the character of a Defendant. Whether the interest contracted for be freehold or leasehold, it seems reasonable that he who comes for a specific performance, should be prepared to show, that he is able to give what he seeks to

There are many cases in which a Court of Equity will not interfere in favour of a Plaintiff, except upon terms which

(a) 2 Bos. & Pull. 22.

VOL. II.

F f

1817.

FILDES
v.

HOOKER.

could not be directly enforced against him in the character of a Defendant.

compel a purchaser to take. What is contracted for, is not merely a piece of parchment containing certain covenants. It is an interest in land which is agreed to be given him; and is this Court to tell the Defendant he has no right to enquire whether the Plaintiff has any such interest to give? It would be quite new for a Court of Equity to enforce performance on one side, without examining whether there be a capacity to perform on the other.

It was hardly contended, as a general proposition, that a Court of Equity would so act with respect to leasehold interests of every description. But it was attempted to make distinctions. It was said, The agreement here is for a lease for only twenty-one years, and at a rack-rent, and therefore the case is to be considered differently from one in which a long term is to be granted, or a large fine is to be paid, or expensive improvements are covenanted to be made. But it may be a great inconvenience and detriment to a lessee for twenty-one years, to be evicted in the middle of his term. That which, at the commencement of the term, was a lease at rack-rent, may, from various circumstances, become a beneficial interest before the end of it. The thing contracted for is not a precarious enjoyment from one year to another, but an absolute term for twenty-one years, of which the value depends on the certainty of its duration. I do not therefore see why a person bargaining for such an interest should be compelled to take it without a title.

It was with regard to a rack-rent lease for seven years, that Lord *Mansfield* said, it was the tenant's fault that he did not look into the title. Yet a Court of Equity is to say, he is bound to take the lease without looking into the title.

But then it is said, that in this case the tenant will have as good a title as, with reference to the nature of the subject, can reasonably be required. There may be cases, in which, (as from length of possession,) a strong presumption of title exists, though no actual title can be shewn. I leave all such cases untouched; cases, such as *White v. Foljambe (a)*, and *Deverell v. Lord Bolton (b)* would have been, if the subject had been truly described. But here, there had only been a two years' enjoyment at the time the contract was entered into; nor has there, even now, been such a length of possession as would suffice to raise a presumption of title. To say that the purchaser must be contented with such a title, would be to say, in other words, that he has no right to require any title whatever.

1817.
FILDES
v.
HOOKER.

Then it is said, that property of this kind would thus be rendered inalienable; but no such consequence would follow. The only consequence would be, that when the owner is unable or unwilling to show a title, he will say so upon entering into the treaty. He can have no motive for his silence, but the expectation of getting a better price than might possibly be given, if his actual intention to produce no title were previously disclosed.

The Master, by approving the title, as shown by the abstract, rendered it unnecessary for the Plaintiff to go further, and to produce, if that were in his power, the title of the ground-landlord.

If he has any serious expectation of being able to produce it, I do not think he ought to be deprived of the opportunity of so doing, or of obviating the objections, which, having for the first time been made at

The consequence of requiring production of the lessor's title, in the absence of any stipulation to the contrary, will be, not to render property inalienable, but only to oblige the owner, if he does not mean to produce the lessor's title, to say so, on entering into the treaty.

(a) 11 Ves. 337.

(b) 18 Ves. 508.

1817.

FILDES

v.

HOOKER.

the bar, he had not before had an opportunity of answering or endeavouring to remove.

But the Exception must be allowed, because the Report implies, that a good title is shown by the abstract, whereas I am of opinion that, upon the face of the abstract, no sufficient title appears.

Exception allowed. (a)

Objection on the ground of non-production of lessor's title, overruled, in the case of a Bishop's lease.

(a) In the case of *Fane v. Spencer*, determined by the Vice-Chancellor, July 15. 1815, an objection was taken by the Defendant, the purchaser of an estate held on lease for lives under the Bishop of *Bath and Wells*, on the ground that it was not shown, by the abstract or otherwise, that the Bishop had any right to make the lease under which the Plaintiff, the vendor, derived her title. The abstract commenced with a lease from the then Bishop in 1763, since which the title was regularly deduced to the Plaintiff. There was no condition in the particulars of sale that the purchaser should not require, nor the vendor be bound to produce, the title of the ground-landlord. The Master, on a reference, reported in favour of the title, and, exceptions being taken to the report on the above grounds, they were argued at several times before the Vice-Chancellor, by *Wray* in support of the exceptions, and Sir *S. Romilly*, contra. At last, His Honour overruled the exceptions, on the ground that this was the case of a Bishop's lease, and therefore distinct from the question which arises on ordinary leases, the statute prescribing the mode of granting, and the presumption arising from the use of the Bishop's seal being equivalent to that which is founded on admission in the case of a copyhold.

1817.

FISH v. KLEIN.

ROLLS.

March 11.

JOHN FISH, by will, devised and bequeathed the residue of his real and personal estate to his wife and the Defendant *Klein*, their heirs, &c. upon trust, in the first place, to set apart so much as should be most consistent with the trusts of the will, in order to the taking by his wife of the yearly sum of £2400 during her life; and, subject thereto, to sell and dispose of his said real and other estate to pay debts and legacies; and gave the whole residue to his wife, her heirs, &c. for ever.

The testator died in *March*, 1813; and, after his death, the widow, together with the Defendant *Klein*, sold and conveyed considerable part of the real estate, among others, to one *Tinkler*, for £60,000.

After the sale, a doubt arose whether the conveyance was effectual, on the ground that *Klein* was an alien, and as such incapable of taking, except for the Crown. In order to obviate this difficulty, an act of naturalisation was applied for and obtained, whereby it was enacted (according to the modern form) "that the said *Frederick Klein* shall be, and is thereby from thenceforth naturalised; and shall be to all intents and purposes, reputed and taken to be in every condition, respect, and degree, as if he had been born a natural subject within the United Kingdom;" and further, "shall be and is hereby enabled and adjudged able, to

Alien, devisee in trust to sell, joins in conveyance, and afterwards obtains an Act of Naturalisation, by which it is declared that he is "from thenceforth naturalised," and shall be and is enabled "to ask, take, have, retain, and enjoy, &c. all lands which he may or shall have by purchase or gift of any person or persons whatsoever."

This Act does not operate to confirm the title of the purchaser under a conveyance previously made. Exception to the Master's

Report, requiring further Acts to confirm that title, overruled accordingly.

1817.

FISH
v.
KLEIN.

“ all intents and purposes and constructions whatever, to
 “ inherit and be inheritable and inherited, and to demand,
 “ challenge, ask, take, retain, have, keep, and enjoy, all
 “ or any manors, lands, tenements, &c. and other pri-
 “ vileges and immunities, benefit, and advantage in law
 “ or equity, belonging to the liege people and natural-
 “ born subjects of the said United Kingdom; and to
 “ make his resort or pedigree as heir to his ancestors,
 “ lineal or collateral, by reason of any descent, re-
 “ mainder, reverter, right, title, conveyance, legacy or
 “ bequest whatsoever, which hath, may, or shall from
 “ thenceforth descend, remain, revert, accrue or grow
 “ due unto him, as also from thenceforth to ask, take,
 “ have, retain, keep and enjoy, all manors, &c. which
 “ he may or shall have by purchase or gift of any person
 “ or persons whomsoever, and to prosecute, &c. and
 “ defend all actions, suits, &c. as lawfully, &c. as if he
 “ had been born of parents, being natural-born sub-
 “ jects of the said United Kingdom, and as any person
 “ or persons born or derived from parents being natural-
 “ born subjects of the said United Kingdom may lawfully
 “ or in any wise do, and shall in all things, and to all
 “ intents and purposes, be taken to be, and shall be, a
 “ natural liege subject of the said United Kingdom, any
 “ law, &c. to the contrary notwithstanding.”

The vendee, however, insisted, that the act of naturalisation would not have the effect of confirming a title derived from the vendor while an alien; that this could only be done by an express Act of Parliament for that particular purpose, or by a grant from the Crown. That although an act of naturalisation would enable the alien to hold any land of which he continued seised, it could not retrospectively establish an invalid title. (a) A

(a) The vendors had been naturalisation act; but a de-
 desirable of having retrospec- parture from the common form
 tive words introduced in the was found to be impracticable.

petition was therefore presented in this cause (being a suit to carry the trusts of the will into execution) in order to take the opinion of the Court upon the objection.

1817.
FISH
v
KLEIN.

Upon this petition, it was referred to the Master, to consider and state to the Court whether an Act of Parliament, for the express purpose of confirming the title, or a grant from the Crown, was necessary to establish and confirm the title of persons who purchased and took conveyances of estates from these trustees previously to the act of naturalisation, and whether they were now enabled to compel a specific performance of the contracts made and entered into previously to the said act; and, if another act or grant should appear to be necessary, then at whose expense the same should be obtained.

The Master reported, that there did not appear to be any provision in the act which had clearly the effect of confirming, in favour of the purchaser, the conveyances executed by *Klein* before the act passed; and, therefore, that either an act or a grant from the Crown was necessary to confirm the title of such previous purchasers. The Master was also of opinion, that the trustees might compel a specific performance of the contracts entered into previously to the act.

Exceptions were taken to this Report by the Plaintiff, Mrs. *Fish* (the widow), and came on now to be argued.

Sir *Samuel Romilly*, *Martin*, and *Sugden*, for the exceptions, contended, that the act must be taken to have a retrospective operation. That the words, "may or shall have," referred to the capacity of the alien at the time of the act passing; and that, if the estate had then remained in him, he would, of course, have been

1817.

FISH
v.

KLEIN.

of ability to retain it. It was, therefore, simply a question of construction; and it must have been intended to confirm the title of those to whom the alien had conveyed, to estates which the alien himself might have retained, had they remained vested in him; and the words were sufficient to effectuate the intention. That, as the act gave up the right of the Crown to all estates which the alien had acquired, it followed that the right of persons claiming under him was confirmed; and that the word "he" must be, for that purpose, taken as if it included those claiming under him, together with him.

Page's case (a), and *The Attorney-General v. Duplessis (b)*, were cited, where naturalisation is expressly distinguished from denisation, for "that cancels all defects, and is allowed to have a retrospective energy which simple denisation has not."

Hart, Preston, and Rose, for the Master's report, insisted, on the contrary, that the words must be construed in their ordinary sense, and the intention of the legislature was no otherwise to be collected.

The MASTER of the ROLLS held, that the estate being out of the Defendant at the time when the act passed, and the act itself being silent as to the conveyance in question, it was impossible to consider his alienee in any better situation, as to title, than the Defendant himself. But that, as it was a new question which had never been expressly decided, the testator's general estate ought to be at the expense of putting it out of controversy.

[Exception overruled.]

(a) 5 Rep. 52. referring to P. C. 91. And see Co. Litt. Plowd. Comm. 477. 33. a. 2 Blackst. 249., which (b) 2 Ves. 286. 538. 5 Bro. were also referred to.

1817.

SOUTHEY v. SHERWOOD and Others.

March 18, 19.

MOTION for an injunction to restrain the Defendants from printing, publishing, or selling a poem, called "Wat Tyler;" and from causing the same to be printed, published, or sold. The affidavit of the Plaintiff in support of the motion stated, that in the year 1794, when the Plaintiff was a young man under twenty-one, he composed the poem in question, which was taken to *London* by a friend of the Plaintiff's, and placed in the hands of *Ridgeway*, a bookseller and publisher, for his perusal and consideration as to printing and publishing the same. That the Plaintiff coming to *London* soon afterwards, being still under twenty-one, conferred with *Ridgeway* and one *Symonds* (deceased) on the printing and publishing the poem, and shortly afterwards returned into the country. That *Ridgeway* and *Symonds* seemed at first inclined to publish; and the Plaintiff, living in the country, and being much occupied by various literary works, forgot to demand back the MS.; but he had never assigned the copyright of the poem to any one, nor received any remuneration for the same, and the same was never, to the best of his knowledge and belief, printed or published by *Ridgeway*, or by any other person, till it was printed by the Defendants, as after mentioned. That he had been informed and believed that the Defendants (who were booksellers and partners) had very lately, in the present year 1817, printed and published, and were then selling, an edition of the poem; and that he had in no wise con-

Injunction refused to restrain publication of a work which had been left for 23 years by the Author in the hands of a Bookseller, to whom it was originally sent with an intention of its being published; that intention being afterwards relinquished, and the work having passed into the hands of the Defendants, who published it without the consent or privity of the Author.

Property of an Author in an unpublished work, independent of the Statute.

The Court will not interfere by Injunction, upon the Author's application, to restrain the publication of a work which is of such a nature as that an action could not be maintained upon it for damages.

1817.

SOUTHEY
v.
SHERWOOD.

sent to the publication by the Defendants, but the same had been published by them without his privity or consent, and he was very desirous that it should not be printed or published; submitting that the copyright remained with him, and the Defendants had no right to publish without his consent or privity.

This was accompanied by the affidavit of *Ridgeway*, that the poem had been published without the privity or consent of the deponent, who had no claim to the copyright; and by another affidavit, stating that the Defendants were the successors in business of *Symonds* deceased, and proving a letter, as charged by the bill, to be of the hand-writing of the Defendant *Sherwood*, which letter was addressed by him to *Ridgeway*, and was as follows: "Dear Sir, In reply to your note of yesterday, I cannot satisfy you how "*Wat Tyler*" found its way before the public. It is not our property. We sell it for another person; but this much I can assure you, that it was not found among Mr. *Symonds's* papers, nor do I believe that he ever had it in his possession, except on the occasion mentioned by Mr. *Ridgeway*."

The bill prayed, besides the injunction, an account of the profits made by the publication.

Hart and *Shadwell*, in support of the motion, said, that their application was founded on *Macklin v. Richardson* (a), deciding that the author has a property in an unpublished work, independent of the statute (b) which is capable of being protected by injunction; and that the present Plaintiff had never relinquished this property.

Sir *S. Romilly* and *Montagu*, contra, insisted that the work in question, from its libellous tendency, was of

(a) Amb. 694.

(b) 8 Ann. c. 19.

such a nature that there could be no copyright therein; and referred to *Walcot v. Walker* (a), and to the case of *Dr. Priestley* there alluded to, which was this: The Plaintiff brought an action against the hundred for damages for the injury sustained by him in consequence of the riotous proceedings of a mob at *Birmingham*; and, among other property alleged to have been destroyed, claimed compensation for the loss of certain unpublished MSS. offering to produce booksellers, as witnesses, to prove that they would have given considerable sums for them. On behalf of the hundred, it was alleged that the Plaintiff was in the habit of publishing works injurious to the government of the state; but no evidence was produced to that effect; upon which Lord Chief Justice *Eyre* said, if any such evidence had been produced, he should have held it was fit to be received as against the claim made by the Plaintiff. Several passages were read from the work itself in support of the charge as to its tendency.

1817.
SOUTHEY
v.
SHERWOOD.

Hart, in reply, contended that, upon the ground last taken, the Plaintiff would be entitled to the interposition of this Court on account of the injury done to his reputation by the publication of a work, the sentiments of which he now disavowed, and sought to discountenance.

THE LORD CHANCELLOR:

If this publication is an innocent one, I apprehend that I am authorised, by decided cases, to say that, whether the author did or did not intend to make a profit by its publication, he has a right to an Injunction to prevent any other person from publishing it. If, on the other hand, this is not an innocent publication, in such a sense as that an action would not lie in case of

(a) 7 Ves. 1.

1817.

SOUTHEY
v.
SHERWOOD.

its having been published by the author and subsequently pirated, I apprehend that this Court will not grant an Injunction. The Court does not interfere in the way of Injunction to punish or to prevent injuries done to the character of individuals; but it leaves the party to his remedy at law. It is to prevent the use of that which is the exclusive property of another, that an Injunction is granted. There is, however, a difference between the case of an actual publication by the author, which all the world may pirate, and that of a man, who, having composed a work, of which he afterwards repents, wishes to withhold it from the public. I will not say that a principle might not be found which would apply to such a case as that; but then it is necessary to take all the circumstances of the case into consideration. The circumstances of the present case are very extraordinary. I will assume that the work is of such a nature that the sending it forth into the world might have been treated as a criminal act. In that view of the circumstances, I have no jurisdiction to consider its criminality. The work was composed so long ago as the year 1794. The Plaintiff's affidavit admits that, in that year, there was a serious intention of publishing it. It was sent by the Plaintiff to Mr. *Ridgeway*, and is supposed to have been delivered by him to *Symonds*. The affidavit goes on to state that it was afterwards determined not to publish it. I will suppose that it was not thought worth while to publish it, in a pecuniary view. Mr. *Ridgeway* gives no account how it passed out of his hands; and all that is alleged concerning the subsequent disposal of it, is, that Mr. *Southey*, living in the country, forgot it. If the work be such an one as it has been described to be, it is extraordinary that, with the change alleged to have taken place in Mr. *Southey's* opinions, there should be nothing stated to account for its having been left by him in Mr.

Ridgeway's hands to the present time, but that Mr. *Southey* forgot it. It is impossible that Mr. *Southey* could have forgotten it. There must have been some other reason. If a man leaves a book of this description in the hands of a publisher, without assigning any satisfactory reason for doing so, and has not enquired about it during twenty-three years, he surely can have no right to complain of its being published at the end of that period.

1817.
SOUTHEY
v.
SHERWOOD.

The LORD CHANCELLOR :

March 19.

I have looked into all the affidavits, and have read the book itself. The bill goes the length of stating that the work was composed by Mr. *Southey* in the year 1794; that it is his own production, and that it has been published by the Defendants without his sanction or authority; therefore seeking an account of the profits which have arisen from, and an Injunction to restrain, the publication. I have examined the cases that I have been able to meet with, containing precedents for Injunctions of this nature, and I find that they all proceed upon the ground of a title to the property in the Plaintiff. On this head a distinction has been taken, to which a considerable weight of authority attaches, supported, as it is, by the opinion of Lord Chief Justice *Eyre*, who has expressly laid it down that a person cannot recover in damages for a work which is, in its nature calculated to do injury to the public. Upon the same principle, this Court refused an Injunction, in the case of *Walcot v. Walker*, inasmuch as he could not have recovered damages in an action. After the fullest consideration, I remain of the same opinion as that which I entertained in deciding the case referred to. It is very true that, in some cases, it may operate so as to multiply copies of mischievous publi-

1817.

SOUTHEY

v.

SHERWOOD.

cations by the refusal of the Court to interfere by restraining them; but to this my answer is, that, sitting here as a Judge upon a mere question of property, I have nothing to do with the nature of the property, nor with the conduct of the parties except as it relates to their civil interests; and if the publication be mischievous, either on the part of the author, or of the bookseller, it is not my business to interfere with it. In the case now before the Court, the application made by the Plaintiff is on the ground only of his civil interest; and this is the proper place for such an application. I shall say nothing as to the nature of the book itself, because the grounds upon which I am about to declare my opinion render it unnecessary that I should do so.

—[His Lordship here recapitulated the circumstances already detailed, of the original intention to publish, the subsequent abandonment of that intention, the length of time during which the Plaintiff had suffered the work to remain out of his possession without enquiry, and its recent publication by the Defendants.]

Taking all these circumstances into my consideration, and after having consulted all the cases which I could find at all regarding the question, — entertaining also the same opinion with Lord Chief Justice *Eyre* as to the point above noticed, — it appears to me that I cannot grant this Injunction until after Mr. *Southey* shall have established his right to the property by an action. (a)

[Injunction refused.]

(a) I have been favoured by Mr. *Blackburne* with the following note of a case, which may be considered as somewhat curious with reference to the principles upon which the foregoing was decided. It is taken from a MS. volume of cases, probably collected by Mr. *Emlyn*, who is mentioned in the Register's book as being of counsel for the Defendants.

Burnett v. Chetwood.

" *Parker C.*

" A bill brought by the Plaintiff as executor of *Burnett*,
 " the author of *Archæologia Sacra*, against the Defendant
 " for an Injunction to stay the printing and publishing a
 " translation of the said book, suggesting it to be an in-
 " jury to the executor, in whom the property of the book
 " was vested by 8 *An. c.* 19.; it was insisted on for the De-
 " fendant, that a translation of a book was not within the
 " intent of the act, which being intended to encourage
 " learning by giving the advantage of the book to the
 " author, could be intended only to restrain the mechanical
 " art of printing, and that others should not pirate the copy
 " and gain an advantage to themselves by reprinting it;
 " but not to hinder a translation of the book into another
 " language, which in some respects may be called a different
 " book, and the translator may be said to be the author, in
 " as much as some skill in language is requisite thereto,
 " and not barely a mechanic art, as in the case of reprint-
 " ing in the same language; that the translator dresses it up
 " and clothes the sense in his own style and expressions,
 " and at least puts it into a different form from the original,
 " and *forma dat esse rei*; and therefore should rather seem
 " to be within the encouragement than the prohibition of
 " the act.

" LORD CHANCELLOR said, that though a translation
 " might not be the same with the reprinting the original,
 " on account that the translator has bestowed his care
 " and pains upon it, and so not within the prohibition
 " of the act, yet this being a book which to his know-
 " ledge, (having read it in his study,) contained strange no-
 " tions, intended by the author to be concealed from the
 " vulgar in the Latin language, in which language it could
 " not do much hurt, the learned being better able to judge
 " of it, he thought it proper to grant an injunction to the
 " printing and publishing it in English; that he lookt upon
 " it, that this Court had a superintendency over all books,
 " and might in a summary way restrain the printing or
 " publishing any that contained reflections on religion or
 " morality.

" An injunction was granted."

1817.

SOUTHEY
 v.
 SHERWOOD.

1817.

SOUTHEY

v.

SHERWOOD.

Burnett

v.

Chetwood.

The following is an extract from the register's book, 1720. A. fo. 350. b.

“ *Geo. Burnett* Gen. quer. } Jovis, 12 October.
Gul. Chetwood, Joh. Watts, } Upon opening the matter
 et al. Defend : } this present day unto the Right
 Honourable the Lord High Chancellor, &c. by Mr. *Lutwych*,
 Mr. *Wilkinson*, and Mr. *Mead*, being of the Plaintiff's counsel, in the presence of Mr. *Kettleby* and Mr. *Emlyn*, being of counsel for the Defendants, it was alleged that *Thomas Burnett*, doctor of laws, (to whom the Plaintiff is executor) having in his life-time, about the year 1692, written in the *Latin* tongue, and published, a book entitled *Archæologia Philosophica*, which book was printed for *Walter Ketilby*, then a bookseller, in whose name the said book was entered in the registry of the Stationers' Company; and a certain writer having afterwards published a book called *The Oracles of Reason*, and therein inserted a translation of part of the said Dr. *Burnett's Archæologia Philosophica*, without his having had notice thereof, the said Dr. *Burnett*, in order to prevent for the future his said book from being reprinted, abridged, or translated, without his leave or approbation, insisted that the said *Ketilby*, his bookseller, should make a declaration of trust to him of the said copy, which the said *Ketilby* did accordingly, by writing under his hand and seal dated the 22d of *February*, 1694; and no person did, during the said Dr. *Burnett's* life, presume to translate the said book, he having, in several passages in his other writings, expressed himself that the book was only intended for the learned, and for that reason was wrote in *Latin*, and not in the vulgar tongue; but since the said Dr. *Burnett's* death, the Defendants have entered into a confederacy with other booksellers to have the said book translated into *English*, and published, and advertisements have been inserted in the newspapers that the said book, being translated by Mr. *Roussillion*, the translation would speedily be delivered out to the subscribers; and, upon enquiry, the Plaintiff finds that the said translation is erroneous, and the sense and words of the author mistaken, and represented in an absurd and ridiculous manner. That the said Dr. *Burnett* was also author of a book, intituled *De statu mortuorum et resurgentium*, which he did not design should be published, but the Defendants having got a surreptitious copy thereof, gave out they intended to

procure the same to be translated and published. That the Plaintiff being executor to the said Dr. *Burnett*, and by virtue of the statute of the 8th of Queen *Anne*, entitled, "An Act for the encouragement of learning," having a right to the copies of the said books, and to the sole right of printing and publishing the same, or to reserve the same unpublished, did cause notice to be given, that this day this Court would be moved for an Injunction to stay the printing, publishing, and selling the said *Archæologia Philosophica*; whereupon the said Defendants, in contempt of this Court, have, in a printed newspaper entitled *The Daily Journal*, of which they or some of them are proprietors, inserted certain advertisements which are reflecting on, and in effect bidding defiance to, this Court; and by advertisement in the said newspaper dated the 10th instant, and this day, have reflected on and publicly exposed Mr. *Francis Wilkinson*, for doing his duty in this Court, as being counsel for the Plaintiffs in this cause: Whereupon, and upon hearing of what was alleged on both sides, his Lordship doth order, that an Injunction be awarded against the Defendants to restrain them, their printers or agents and workmen, from printing, selling, or publishing the translation into English of the said late Dr. *Burnett's* book, entitled *Archæologia Philosophica*, and likewise to stay the translating, printing, publishing, and selling the said Dr. *Burnett's* book *De statu mortuorum et resurgentium*; and the Defendant *W. Chetwood*, and all other persons concerned in translating or printing the said books, are forthwith to produce upon oath before Mr. *Hiccocks*, one of the Masters, &c., all copies or printed sheets which they have, or at the time of the notice of this motion had, in their custody or power, of the said books or either of them. And his Lordship doth further order, that the said Defendant *Chetwood*, and all other parties concerned as proprietors, or in printing and publishing the said advertisements, in the said newspapers entitled *The Daily Journal*, dated the 10th of this instant *October*, and this day, do upon notice hereof shew good cause unto this Court, the first day of the next term, why they should not stand committed to the prison of the Fleet for their said offence and contempt.

1817.

SOUTHEY

v.

SHERWOOD.

Burnett

v.

Chetwood.

1817.

March 25.

BIRCH v. HAYNES.

On a reference of title, the Master having reported that a good title could be made, Order, referring it back to the Master to see whether such title could have been made prior to the filing of the bill by the vendor for a specific performance.

BY a memorandum of agreement dated 23d April, 1814, signed by the Plaintiff and Defendant, it was expressed that the Plaintiff agreed to sell, and the Defendant to purchase, for £1,500, of which £200 to be paid at the end of two months, (the Defendant giving his note for the amount payable accordingly,) and interest to be allowed thereon to the 2d of November, when the remainder of the purchase money was to be paid. It was further agreed that the purchaser should be satisfied with a similar title to that which had been accepted by *Thomas Eyton, Esq.* as to property situate within the boundaries of the same manor in which the lands now agreed to be sold were situate. Interest at four and a half *per cent.* to be allowed, to the vendor if the payment should be delayed beyond the 2d of November, but, if made sooner, then interest to be allowed to the Defendant for the difference.

The Bill, filed by the vendor for a specific performance of this agreement, alleged, that the defendant was let into possession, and exercised acts of ownership on the premises, and that, on the 20th of *October*, the Plaintiff attended at his request, at a court of the manor in which the premises were situated, for the purpose of making a surrender, when the Defendant refused to accept the same, or to pay the remainder of his purchase money.

The Defendant, by his answer, stated that the abstract was not delivered till the 17th of *October*, 1814; that his attorney, on perusing the same, found that the

Plaintiff could not make a good title; — and that, upon the ground that the title was not marketable, or such as he had agreed to accept, he had refused to accept the surrender.

1817.
BIRCH
v.
HAYNES.

The Order of reference referred it to the Master to see whether the Plaintiff could make a good title; and, if not, whether he could make a similar title to that accepted by Mr. *Eyton*, pursuant to the agreement. The Master reported that the Plaintiff could make a good title.

A motion was now made, on the part of the Plaintiff, to confirm the Report, and that the Defendant might be ordered to pay the remainder of his purchase money with interest.

Leach and Rouspell, in support of the motion.

Sir *S. Romilly* and *Agar*, contra,

Contended, with reference to the question of costs, that it ought to be ascertained at what time the Plaintiff could have made a good title.

The LORD CHANCELLOR. (a)

In cases of reference to the Master upon title, if the order does not direct the Master to enquire at what time a good title could be made, yet if, upon proceeding before the Master, it appears that a good title can be made, upon evidence which was not in the possession of the vendor at the time of the reference, but has been subsequently obtained, it has never been held that, when the case comes before the Court upon further directions or on petition, you may not have an enquiry

(a) *Ex Relatione.*

G g 2

1817.
 BIRCH
 v.
 HAYNES,

at what time a good title could first have been made, and at what time it first appeared that a good title could be made.

His Lordship said, that whether it would be proper for the Court in all cases to make the enquiry *ab ante*, was another question, but that the present was a case which appeared to call for such enquiry.

Order, confirming the report, and referring it back to the Master to see whether the Plaintiff could, before filing the bill, make a title similar to that accepted by *Thomas Eyton*, of the premises in the agreement mentioned, and when the Plaintiff first showed to the Defendant that he could make such title. (a)

(a) Reg. Lib. B. 1817. fo. 902.

March 27.

NEWBERY v. JAMES and Others.

The Court will not interfere by Injunction to prevent

THE Bill stated that Dr. *Robert James* deceased, “being the inventor and proprietor of certain pills for the gout, rheumatism, &c. and of a certain the violation of an agreement, of which, from the nature of the subject, there could be no decree for a specific performance: as, for instance, to restrain the Defendant from imparting the secret of an invention which had been the subject of a patent long since expired.

To support a patent, the specification should be so clear as to enable all the world to use the invention from the moment of the expiration of the patent.

“ powder for the cure of fevers, &c., and being desirous
 “ to extend the circulation and use of the said medi-
 “ cines, and thereby to increase the profits to arise
 “ therefrom,” applied to *Newbery* (the Plaintiff’s late
 father) to assist him in such design, which *Newbery*
 agreed to do upon the terms after-mentioned; and that
 thereupon certain articles of agreement were made and
 entered into between them, whereby *James*, for himself,
 his heirs, &c. covenanted with *Newbery*, his executors,
 &c. that he, *James*, his executors, &c. should, during
 the term of twenty-one years, prepare and make the
 aforesaid pills, and sell and deliver the same to *Newbery*
 at a certain rate therein mentioned, and should also
 prepare and make the aforesaid powder, and sell and
 deliver the same to *Newbery* at the rate therein men-
 tioned, when and as often as he should have occa-
 sion to require the same respectively, to supply his cus-
 tomers; and should not sell or cause to be sold any of
 the said medicines, during the term, to any other person
 or persons, (except in the course of his own private
 practice, and then not in the same form, or under the
 same title, nor at a lower rate than *Newbery* should sell
 the same to his customers); and, in order to protect
 the secret of preparing all or any of the said medicines
 from being lost, he thereby further covenanted to
 instruct *Newbery* in the true art and method of making
 and preparing the same, and to be at an equal expense
 with *Newbery* in obtaining a patent; *Newbery* on his
 part covenanting during the term to take the medi-
 cines from *James* as he should have occasion, and not
 to make or prepare, or cause or procure to be made or
 prepared, by any other person or persons, nor to dis-
 cover or make known to any person or persons the
 secret, art, or mystery of making or preparing, any of
 the said medicines, so long as *James* should continue to
 supply him: but to be at liberty to leave an account in

1817.

NEWBERY
 v.
 JAMES.

1817.
 NEWBERRY
 v.
 JAMES.

writing, sealed up, how to prepare the same, to be opened by his representatives after his death, in order to instruct them therein.

By Indenture dated the 19th *November* 1747, between *James* and *Newbery*, reciting the articles of agreement, and letters patent of the same date, granted to *James* for the exercise of his invention during the term of fourteen years, and that *Newbery* and *James* had contributed in equal shares to the expense of procuring the same, it was witnessed that *James*, for the considerations therein mentioned, assigned to *Newbery*, his executors, &c. one moiety of the invention during the term of fourteen years mentioned in the patent; it being covenanted on the part of *Newbery* that nothing in the deed should be construed so as to alter or change the articles of agreement, and that neither party should assign his respective interest in the patent without first offering the same to the other.

By Deed poll dated the 5th of *May* 1755, the term of twenty-one years mentioned in the agreement, was extended to an indefinite period, the agreement being expressed to be continued so long as either of the parties, ^htheir executors, &c. or any or either of them, should desire.

Newbery, by his will, dated the 24th of *October* 1767, bequeathed to the Plaintiff all his share and interest in the preparing and vending the various medicines therein mentioned, and among others, of the pills and powders above mentioned. The bill then stated a similar agreement between *James* and the Plaintiff, respecting an invention of *James*, of certain pills called "Analeptic Pills," but for which no patent had been obtained.

James died in the year 1776, having first made his will, and thereby appointed the Plaintiff and another executors, to whom he gave and bequeathed all the powders and pills then in his possession, or which should thereafter be made by his son *Robert Harcourt James*, as therein mentioned, upon the trusts therein mentioned, and subject thereto to permit the said *R. H. James* to receive to his own absolute use and benefit the residue of the profits arising from the sale thereof.

1817.
NEWBERRY
v.
JAMES.

Robert Harcourt James continued to make and prepare the several medicines, and to deal with the Plaintiff upon the footing of the agreement during his life; and died in 1801, having by his will given to his executors therein named, the sole use and management of the concern, until his son, the Defendant *Robert George Gordon James*, should attain twenty-four, upon the trusts therein mentioned; and, upon his attaining twenty-four, then he gave to the said *R. G. G. James* the right to the sale of the said medicines, and all profits arising therefrom, and directed *George James* (one of his executors, to whom he had entrusted the secret of preparing the medicines,) thereupon to deliver the same to him.

The Bill, (to which the executors, and the said *R. G. G. James*, and other parties interested in the will of *R. H. James*, were made parties), charging that the Defendants or some of them, had refused to supply the Plaintiff as usual, according to the terms of the agreement, and that they threatened to communicate the secret of preparing the medicines, insisted on the indefinite continuance of the agreement so long as either party should desire, and prayed a specific performance, and an injunction to restrain the Defendants from disclosing or imparting the secret of making and preparing

1817.
 NEWBERRY
 v.
 JAMES.

the medicines, other than and except to such persons, and in such manner, as in the said several deeds and wills described; and also from selling or vending all or any of the said fever powders, pills, or medicines, to any persons, for sale or otherwise, other than and except to the Plaintiff, or with his consent or approbation.

Upon the filing of the bill, an application was made for an injunction only as to the sale of the medicines, which was granted, expressly without prejudice to any question that might be made as to the possibility of sustaining such an injunction.

The Defendants, by their answer, insisted on various acts of the Plaintiff as evidence of an abandonment or waiver, on his part, of the agreement, in consequence of which they contended that the Defendants were not to be considered as bound by the terms thereof, nor obliged to employ the Plaintiff to vend the said medicines.

A motion was now made, on the part of the Defendants, to dissolve the injunction.

Bell and Courtenay, in support of the motion.

Sir *S. Romilly*, *Leach*, and *Trower*, *contra*.

March 27.

The LORD CHANCELLOR said, the difficulty in such a case was, how to decree the specific performance of the agreement. Either it was a secret, or it was none. If a secret, what means did the Court possess of interfering so as to enforce its own orders?—if none, there was no ground for interfering. The Injunction being already granted *ex parte*, afforded no reason for its continuance, even though the answer had not materially varied the case made by the bill; it being granted without prejudice to any question that might be made

in the cause. In this case, the medicines in question were the subject of a patent which had expired; and the agreement which the bill sought to enforce was an agreement, by which, independently of the patent, the proprietors had entered into covenants not to sell that which was the subject of the patent, except to each other. But, in order to support a patent, the specification should be so clear, as to enable all the world to use the invention as soon as the term for which it has been granted is at an end. Then, with regard to the Analeptic pills, for which no patent had been procured, if the art and method of preparing them were a secret, what signified an injunction, the Court possessing no means of determining on any occasion whether it had or had not been violated? This Court could do nothing but put the parties in a way to try their legal rights by an action. That was the utmost extent to which it would go, and he would not even order the Injunction to be continued in the meantime till an action should be tried. The only way by which a specific performance could be affected, would be by a perpetual injunction; but this would be of no avail, unless a disclosure were made to enable the Court to ascertain whether it was or was not infringed; for, if a party comes here to complain of a breach of injunction, it is incumbent on him first to shew that the injunction has been violated.

His Lordship concluded by saying, that he thought he ought not to continue the injunction; and that, if he did not mention the case again, his opinion must be considered to be that the injunction must be dissolved, — the Defendants to keep an account of what they sell, — and the Court to give the parties the means of trying their rights in an action, by removing out of their way the difficulty arising from the circumstance of the Plaintiff being one of Dr. James's executors.

1817.
NEWBERRY
v.
JAMES.

1817.

March 29.

Ex parte PINCKE.

Solicitor under a commission of lunacy not to be appointed receiver of the estate of the lunatic.

THIS was a petition, that the petitioner (the committee of the person of a lunatic) might be at liberty to propose before the Master the solicitor to the commission as receiver of the lunatic's estate, stating that nobody else was willing to accept the office of receiver.

Buck in support of the petition.

The LORD CHANCELLOR.

How can I make this order? In cases of this nature, the Court is extremely jealous of appointing any person to be a receiver, whose duty it is to call the receiver to an account. I remember a case (*a*), in which the Court refused to appoint a Master in Chancery to the office of Committee of a lunatic's estate, upon the ground that he would have to pass his accounts before some one of the other Masters; and that, if once allowed, might lead to such results as would be subversive of the due administration of justice. The same reason applies to the appointment of a person, who acts as solicitor under the commission, to be receiver of the estate.

Petition refused.

(*a*) *Exp. Fletcher*, 6 Ves. 427.

1817.

Ex parte SKINNER and Others.

April 18.

In the Matter of THE LAWFORD CHARITY.

THE petition stated the will of *John Leach*, as follows: "I give and bequeath my farm and lands, " in the parish of *Lawford*, now in the occupation " of *N. Sherman*, to the said parish for ever. I mean " the rents and profits thereof to be always laid out " for clothing ten poor people of the parish yearly, " that take no collection, and for teaching ten poor " children to read and write; the money to be laid " out for the purposes aforesaid by the churchwardens " and overseers of the parish for the time being, and " by three of the chief inhabitants thereof. *Sherman* " to hold the farm, &c. at the same rent he now holds " the same, during his life, keeping the premises in " tenantable repair, and doing by the tenants as he " ought to do."

The testator died in 1723; and the petition went on to state, that the legal estate in the premises (which were copyhold of inheritance) not having passed by the will, a trustee was appointed by the then church-

Petition, under Stat. 52 G. 3. c. 101. must have the signature of the Attorney-general, or of the Solicitor-general, in case only of there being no Attorney-general at the time.

Such signature not to be affixed without the same deliberation, as in the case of an information regularly filed

The statute was meant to extend only to

cases of plain breach of trust committed by persons in their character of trustees, not to the case of benefits derived from such breaches of trust by third persons.

An information having been filed, on petition presented with the same objects, it is not for the Court to separate these objects, and to give relief upon the petition as to such as are regularly within its limits, leaving the rest to be disposed of on the information.

Tenant of a charity estate, provided he has acted fairly, not to be turned out of possession, or to have his lease set aside, merely on the ground of inadequacy of rent to the value of the estate.

1817.

Ex-parte
SKINNER.*In re* LAWFORD
CHARITY.

wardens and overseers, and three principal inhabitants, whom they procured to be admitted as tenant thereof by the lord of the manor; that, upon his death in 1745, another trustee was appointed, and in like manner admitted, and upon the death of the last-mentioned trustee, one *Jarmain* was in like manner admitted in the year 1777.

The petition then stated, that the premises were much more than sufficient in value to answer the purposes of the charity; but the same had nevertheless been long neglected: that, in 1777, when *Jarmain* was admitted and began to act as trustee, they were let at a very low rent, not more than they had been let for at the time of the testator's death, and the same had been still further reduced upon a subsequent letting. That, in 1810, the petitioners (the then churchwarden and overseer, and the rector of the parish, acting as one of the principal inhabitants) procured him to give notice to the then tenant to quit, intending to have taken measures for properly letting the premises; but he, without consulting them, and without any authority, thereupon made a contract with *Eagle* to grant him a lease for fourteen years, at a rent exceeding the former rent, but still much below the actual value of the premises; and that *Eagle* was let into possession accordingly under that agreement, and had since committed various acts of gross mismanagement, with the connivance or concurrence of *Jarmain* and with *Carrington* and *Vincent*, two of the churchwardens, particularly by making exchanges of different parts of the charity estate, confounding the boundaries, &c. On these grounds the petitioners had, in 1811, caused an information to be filed, praying the like relief with that prayed by the present petition, to which the Defendants had appeared and put in answers, and their answers had been excepted to; but, before any further

answers had been put in, *Jarmain* died ; after which the other Defendants, (*Eagle*, *Carrington*, and *Vincent*,) put in further answers, which were also insufficient. It was, therefore, suggested that, on account of the delay which must necessarily take place before the information could be revived against the representatives of *Jarmain*, and the cause brought to an hearing, it would be greatly to the advantage of the charity if the several objects of the information could be carried into effect by this petition, praying that the petitioners might accordingly be at liberty to discontinue proceedings under the information, and that the same might be staid by order of the Court ; that the agreement between *Jarmain* and *Eagle* might be declared to be a fraud upon the charity, and to be set aside and cancelled ; and that directions might be giving for reletting the estate at the most improved rent, and possession delivered accordingly. It also prayed an account of receipts and payments by *Jarmain*, and that *Eagle* (the tenant) and *Jarmain's* executrix might be charged with the full rent, to be ascertained by a reletting, or as the Court should direct, from the date of the agreement ; a reference to inquire into the extent of the injury sustained by the acts of mismanagement imputed to *Eagle*, and that he might make compensation ; an appointment of new trustees to act under the direction of the churchwarden and overseers for the time being ; and a scheme for the administration of the funds, if more than sufficient for the purposes declared by the testator.

The certificate, approving of the petition as fit to be presented, was signed by the *Solicitor-General* only.

Hart and *Wilbraham*, for the petition.

Leach and *Wear*, for *Jarmain's* executrix.

1817.

- *Ex-parte*
SKINNER.
In re LAWFORD
CHARITY:

1817.

Bell, for Eagle, the tenant.

Ex-parte
SKINNER.
vs **LAWFORD**
CHARITY.

For these parties various objections were taken, both as to the jurisdiction of the Court upon petition under the Act of Parliament (a), — as to the insufficiency of the signature of the Solicitor-General, — and upon the merits.

The LORD CHANCELLOR pronounced no order, but made some observations on the frame and objects of the petition, to the effect following :

It appears to me that such a petition as the present, supposing it to be properly within the scope of the Act of Parliament, can derive no sanction from the signature of the Solicitor-General, he being competent to act as, and in the place of, the Attorney-General, only when there is no such officer as an Attorney-General. The intention of the legislature in framing the act, was to guard charitable trusts from abuse, and, for that purpose, to prevent such proceedings from being instituted as are too frequently instituted for no other reason than because it is known that the costs will be payable out of the charity funds. It was with this view that the legislature provided for the signature of the Attorney-General, or, in case of there being no Attorney, of the Solicitor-General; and I desire to have it understood, that no petition under the act ought to receive that signature, except upon the same deliberation that it would be thought fit to afford to the case if it were presented in the shape of an information. With respect to the petition being, or not being, within the scope of the act, I had some time ago a conversation on this subject with the *Master of the Rolls* and the *Vice-Chancellor*, the re-

(a) 52 Geo. 3. c. 101.

sult of which was, that we all considered the act as meant to extend only to cases of plain breach of trust. The objects of the present petition are much more extensive. It proceeds upon the general principle that the Court will not allow any other party to take advantage of a breach of trust committed. But, to constitute a breach of trust, there must be some person who is regularly invested with the character of a trustee; and, in this case, both the trustee and the tenant should be brought before the Court, to enable it to give a complete remedy. I have no jurisdiction under the act to do much of what is prayed by this petition: and there is a great difficulty in separating what are, from what are not, proper objects for a petition under the act, arising from the circumstance that there is an information already on the file for the same objects, which information I can neither dismiss nor in any manner get rid of. I cannot give the relief sought, partly upon information, and partly upon petition.

As to the merits, I shall say no more at present, than that I desire it may not be considered to be my opinion that a tenant, who has got a lease of a charity estate at too low a rent with reference to the actual value, is therefore to be turned out, if it appears that he has himself acted fairly and honestly. The only ground for so dealing with him would be some evidence or presumption of collusion or corruption of motive. If, for instance, the tenant happens to be a relation of the trustee, that is a circumstance to create suspicion. It ought to be remembered, however, that the case of a Charity Estate is one in which, of all others, the security of the rent is the first object to be regarded; and therefore, in such cases, the inadequacy of the rent reserved is less a badge of fraud than it would be in almost any other instance.

1817.

Ex-parte
SKINNER.
In re LAWFORD
CHARITY.

1817.

April 18.

RICKCORD v. NEDRIFF and SAVAGE.

Substitution of service of subpoena to appear and answer refused, where one Defendant resided out of the jurisdiction, and the other admitted by his answer, that he had received a power of attorney from him to receive the arrears (then due) of an annuity, which it was the object of the bill to set aside.

THE Bill prayed, that the assignment of an annuity by the Plaintiff to the Defendant *Savage* might be declared fraudulent and void, and that the Defendant *Nedriff* (to whom *Savage* had delivered the deed of assignment, together with the original grant of the annuity, previously to his absconding from the country, and to whom he had also executed a power of attorney to enable him (*Nedriff*) to receive the arrears then due), might be decreed to deliver up the same, and might be restrained by injunction from receiving the arrears under the power. *Nedriff*, by his answer, admitted the facts of *Savage* having absconded, and being out of the jurisdiction, and of his having previously delivered the deeds and executed the power of attorney as stated in the bill.

Cullen, for the Plaintiff, now moved, on the admissions in *Nedriff*'s answer, that service of the subpoena on *Nedriff* might be deemed good service on the other Defendant; and cited *Coster v. Debrune* (a), and *Hyde v. Foster*. (b)

The LORD CHANCELLOR refused the application, saying, that the proper course for obtaining the relief sought by the bill, would be by motion against the Defendant,

(a) Dick. 39.

(b) Ibid. 102. See *Smith v. The Hibernian Mine Company*, 1 Scho. and Lef. 238.,

where the authority of these cases is expressly denied by Lord Redesdale.

Nedriff, upon affidavit of the facts alleged as constituting the ground for this application (a).

1817.
RICKCORD
v.

NEDRIF and
SAVAGE.

(a) Upon referring to the Register's book, the case of *Hyde v. Foster and Myers*, appears to have been precisely similar to the present. It was there alleged that the Defendant *Foster* was resident at the time of the bill filed, and continued to reside, out of the jurisdiction; and the other Defendant *Myers*, by his answer, set forth that he was factor or agent for *Foster*; and that, by virtue of some power or authority from *Foster*, he had been for some time, and then was, in the possession or receipt of the rents and profits of chambers in *Barnard's Inn*, for the use of *Foster*, which chambers were a part of the premises in question in the cause. The motion was, that service of subpoena to appear, &c. on the Defendant *Myers*, as agent or factor for *Foster*, might be deemed good service on *Foster*. And, on hearing what was alleged by the counsel for the Defendant and the answer of *Myers*, and what had been alleged by counsel on both sides, it was ordered accordingly. — Reg. Lib. 1744. A. fo. 491. b.

WHITE v. WARNER.

April 22.

THIS was a motion for an injunction to restrain the Defendant from suing at law upon the breach of a covenant to keep premises insured from fire. It was represented as a case of great hardship, the Plaintiff having laid out £3,000 in repairs on the premises.

No relief by injunction against a forfeiture for breach of covenant to keep insured.

Leach, in support of the motion.

Sir *S. Romilly* and *Hart*, contra, said that the case of rent was the only one in which a court of equity will

1817.

WHITE

v.

WARNER.

interfere by injunction to restrain proceedings at law upon a breach of covenant.

Reynolds v. Pitt, which was decided by His Lordship (a), and *Rolfe v. Harris*, before the Vice-Chancellor (b), were mentioned as authorities against the interference of the Court in cases of breach of covenant to keep insured.

On the other hand, the circumstances of the present case were gone into and relied upon as forming a special ground for such interference; and the cases of *Sanders v. Pope* (c), and others, referred to, as furnishing the mode of effecting the object upon the principle of compensation.

The LORD CHANCELLOR refused the injunction. He said that he had looked carefully into the cases, and thought they did not bear out the proposition, which was meant to be inferred from them, that the Court will, in cases of forfeiture for breach of covenant, give relief upon the principle of compensation. That the omission to insure was stronger against the tenant than the omission to repair; because, in the latter case, the landlord may, by exercising due vigilance, see to the observance of the covenant; but, in the former, where the lessee has undertaken to keep insured, the landlord must rely upon him for the fulfilment of his obligation.

Injunction refused. (d)

(a) 2 Price, 206. note.

(b) 2 Ibid. 212. note.

(c) 12 Ves. 282.

(d) See *Bracebridge v. Buckley*, 2 Price, Exch. Rep. 200., where the Court refused to give relief against the

landlord's right of re-entry, for a forfeiture by breach of covenant to lay out a sum of money in repairs within a given time, *Wood*, B. *dissentiente*.

1817.

WOOD v. STRICKLAND.

ROLLS.
April 28.
May 5.

BILL by a Rector for an account of tithes. Plea of the Statute (a), supported by averments, that in *August*, 1807, the benefice being vacant by the death of the incumbent in *July* preceding, "it was simoniacally, " corruptly, and against the form of the statute," agreed between the Plaintiff and the then patrons of the living, that the said patrons should present the Plaintiff, in consideration that the Plaintiff should, so long as he remained incumbent, accept from them and their respective lessees or tenants for the time being, the several yearly sums thereafter mentioned, for and in lieu, and in full satisfaction and discharge, of all tithes arising out of the several lands within the parish, of which they were respectively owners; that the Plaintiff did, in consideration of his being presented to the living, and to the end that the patrons

Answer to a Bill by a Rector for an account of tithes, setting up a simoniacal contract, supported by evidence of the contents of a letter alleged to have been written by the witness (one of the patrons of the living) to the Plaintiff, previous to his admission to the living, containing the terms

of the agreement, which were afterwards accepted, and the letter, containing such acceptance, had been subsequently returned to the Plaintiff, and destroyed by him.

On an objection to the admissibility of evidence of the letter containing the proposal, on the ground of want of notice to the Plaintiff to produce the original, *held* that the evidence was admissible, the depositions being sufficient notice.

At law, such evidence would not be admissible without notice, because, it not being known till the time of the trial what evidence will be offered on either side, *non constat*, otherwise, that the original might not be produced. But even at law notice is not necessary, where, from the nature of the proceeding, the party must know that the contents of a written instrument in his possession will come into question.

(a) 31 *Eliz.* c. 6. s. 5.

1817.

WOOD
v.

STRICKLAND.

should present him, agree to accept the said yearly sums in discharge of tithes; "that he did, by the said agreements, and by each of them, corruptly procure and seek the said church and benefice; that afterwards, while the church was so vacant, the said patrons thereof did, in pursuance and consideration of the said simoniacal and corrupt agreement, present the Plaintiff to the said living; and the Plaintiff was, upon such presentation, admitted and instituted, and accordingly afterwards inducted into the same; that the Plaintiff thereby corruptly took and accepted such benefice;" by reason whereof, and by force of the statute, &c. the Defendants insisted, that the Plaintiff was a disabled person in law to have and enjoy the same.

This plea, coming on to be argued (a), was ordered to stand for an answer, with liberty to except; and afterwards, by a further answer, the Defendants said, they had heard that, before the Plaintiff was presented to the rectory, he agreed with the patrons, provided he were presented, not to increase the amount of the compositions payable in lieu of tithes to the then rector by the several occupiers of land within the parish, and that he would accept the same in lieu and full satisfaction thereof, during the whole time he should remain incumbent; and (in particular) that, before he was presented, and as an inducement to or consideration for his being presented to the said living, and while the same was vacant, the Plaintiff agreed with the patrons, and particularly with *William Wood Watson* (one of them), that he would not raise or increase the compositions that had been paid by them to the then late rector, and would accept and take such compositions during the whole

(a) Before the *Vice-Chancellor*, July 28. 1813. See 2 Ves. and B. 150.

time he should remain incumbent; and that, in consideration and consequence of such simoniacal and corrupt agreement, he was presented to the living; such compositions being (as the Defendants believed) very much below the value of the tithes in kind covered by them respectively.

1817.

 WOOD
 v.
 STRICKLAND.

William Wood Watson, being examined on the part of the Defendants, deposed that, soon after the death of the last incumbent, the wife of the Plaintiff, by letter, solicited the deponent to appoint the Plaintiff to the living; to which letter the deponent replied, that he (the deponent) was only one of four patrons of the living, and communicated by letter, written either to Mrs. *Wood* or to the Plaintiff (but which of them he did not then recollect), the terms on which he (the deponent) would apply to the other patrons for their concurrence in admitting the Plaintiff, which (in effect) were; that the Plaintiff should be contented with the other tithes of the living. The deponent further said, that the Plaintiff answered this communication by letter, which letter was to the effect "that he should be glad "to comply with the deponent's wishes in all respects." That he (the deponent) made the other patrons acquainted with the terms which he had submitted to the Plaintiff, and with the Plaintiff's reply; that he had not to his knowledge or belief, in his custody or power, any copy of the letter so sent by him to the Plaintiff or Mrs. *Wood*, containing the terms of the Plaintiff's admission to the living; and that the letter sent by the Plaintiff in answer thereto, was (at the instance of the Plaintiff) delivered by the deponent to the Plaintiff shortly before the time of the Plaintiff's being presented (but for what purpose in particular the deponent did not then know), when the Plaintiff immediately threw the same into the fire, and thereby destroyed it.

1817.

Wood

v.

STRICKLAND.

At the hearing, an objection was taken on the part of the Plaintiff to the admissibility of this evidence, (at least in respect to the letter stated to have been written by the deponent to the Plaintiff,) on the ground that there was no proof of that letter having been lost or destroyed, nor of notice given to the plaintiff to produce the same, and of his having refused to do so.

To this it was answered, that there is no mode of proving notice at the hearing; that the Defendant had no means of knowing whether the letter was in the hands of the Plaintiff or not; that if he had filed a bill of discovery, the Plaintiff might have demurred: and that it was not competent to the Plaintiff, having the letter in his own hands, to object; since, if the contents given in evidence differed from the real contents of the letter, it was his own fault if he did not disprove that evidence by the production of it.

Sir Samuel Romilly and Hall, for the Plaintiff.

Hart and Heald, for the Defendants.

The MASTER of the ROLLS.

Although, in general, the rules of evidence are the same in courts of equity as in courts of law, yet, in the application of those rules, diversities must necessarily arise from the different modes of proceeding in the two jurisdictions. The grounds on which secondary evidence of the contents of written instruments is admitted are in both the same; namely, that the party has not the means of producing them, because they are either lost or destroyed, or in the possession or power of the adverse party. At law it is not known, till the time of the trial, what evidence will be offered on either side. A party, therefore, in order to entitle himself to give

parol evidence of a written document, on the ground of its being in the possession of the adversary, ought to give him notice to produce it; for otherwise, *non constat*, that the best evidence might not be had. But where, from the nature of the proceeding, the party must know that the contents of a written instrument in his possession will come into question, it is not necessary to give any notice for its production.

1817.
WOOD
v.
STRICKLAND.

And, therefore, in trover for a deed (*a*), or an indictment for stealing a bill of exchange (*b*), it has been held that, without previous notice, parol evidence may be given of the contents of the instrument.

In this Court, each party, before the hearing, is fully apprised of all the parol evidence that has been given on the other side.

In the present case, the Plaintiff saw, by the depositions, that the only evidence of the corrupt agreement set up as a defence to the bill, consisted of the contents of certain written communications that had taken place on the subject of his presentation to the living. It is impossible, therefore, that he could be taken by surprise, or could not be prepared to produce any letter that might be in his possession. As the kind of notice given before a trial at law is not necessary, so neither is there any mode in which proof of it could regularly be given at the hearing.

As to what was said of the possibility of the Plaintiff's being able to prove the loss or destruction of the letter, and to show that its contents were different from what

(*a*) *How v. Hall*, 14 East, 274. (*b*) *Aickle's case*, 1 Leach, Cr. C. 330.

1817.

Wood

v.

STRICKLAND.

the witness has represented them to be, it is evident that, with reference to that object, a notice would be altogether nugatory, as it would not the more enable him to introduce at the hearing any evidence of that description. The possibility of answer or explanation might be a good reason for not concluding the party by the evidence, but can be no reason for shutting out the evidence for want of a notice, which, if given, would not have let in such answer or explanation. I do not see, therefore, how I can refuse to hear the deposition of the witness as to the contents of a proposal which must have come to the hands of the Plaintiff, as he returned an answer to it.

The evidence was accordingly admitted, and the cause went on to be heard; when His Honour was pleased to order that the bill should be retained for a twelvemonth, with liberty for the Plaintiff to bring an action; the Defendants admitting the presentation, and undertaking not to plead the statute of limitations.

His Honour refused to give any directions respecting the use to be made of the depositions on the trial at law.

1817.

The Dean and Chapter of CHRIST CHURCH v.
SIMONDS.

April 26.
May 13.

A MOTION was made on the part of the Plaintiffs, that they might be at liberty to withdraw their replication, and to amend their bill by introducing certain passages specified in the notice of motion, upon payment of costs, and amending the Defendant's copy of the bill, requiring no further answer.

The Bill, filed in *Hilary* term 1814, was to set aside a purchase by the Defendant from the Plaintiffs, of the rectory of *Caversham*, on the ground that the purchase was fraudulently obtained; and the bill proceeded to pray that the indenture of conveyance might be delivered up to be cancelled, and that the reversion in fee, expectant on the last lease of the rectory, might be conveyed to the Plaintiffs by the Defendant, on payment back to him of his purchase money with interest.

The Answer was put in in *Michaelmas* term 1814. In *Trinity* term 1815, the Plaintiffs filed their replication, and served subpoenas to rejoin; and a commission to examine witnesses was sealed, but not executed. In *Easter* term 1816, the Defendant moved to dismiss the bill for want of prosecution, which motion was refused on the Plaintiffs undertaking to speed the cause. In *Michaelmas* term 1816, the Defendant gave a rule to produce witnesses.

The purchase against which the Plaintiffs by their bill sought to be relieved, was made so far back as the year 1799, under the act for redemption of the land

Motion for leave to amend, after replication filed and subpoenas served, specifying the nature of the intended amendments, and not requiring a further answer, refused; the case being that of a bill filed in 1814 to set aside a purchase made in 1799, for fraud, inferred from great undervalue; the Defendant by his answer denying knowledge of the value at the time of making the purchase, and the amendments sought to be introduced tending to fix him with the fact of such knowledge.

1817.

The Dean and
Chapter of
CHRIST
CHURCH
v.
SIMONDS.

tax, the Defendant being at that time lessee of the Plaintiffs of the rectory in question. The fraud charged was to be inferred from a gross under-valuation alleged to have been made by the surveyor appointed by the commissioners, whose estimate was stated to proceed on the supposition that the titheable lands of the parish consisted of less than 1500 acres, whereas they amounted in fact to considerably more than 3000; the Defendant (the purchaser) being at the time well acquainted with the true extent and value of the rectory. The amendments sought to be introduced went to show that the estimate made to the commissioners was transmitted by the Defendant himself to the solicitor for the Plaintiffs, in order that an affidavit verifying the same might be made by the surveyor and laid before the commissioners; which affidavit was afterwards laid before them accordingly; the Defendant knowing the representations therein contained to be false, but permitting the same to be so laid before the commissioners in order that they might be deceived thereby; the Plaintiffs causing the same to be laid before them under a mistake, and in the belief of the correctness of the estimate.

The application was supported by an affidavit of the solicitor to the Plaintiffs, of his having lately, by accident, found among the college papers a letter, since acknowledged by the Defendant to be in his handwriting, which, if properly in evidence in the cause, would, it was conceived, have fixed him with the full knowledge of the value of the estate, denied by his answer.

Bell, in support of the motion, compared the proceeding now sought to be had to a bill of review on the discovery of new matter, which can only be brought by

leave of the court previously obtained, upon an affidavit that the new matter could not have been produced, or used by the party claiming, at the time when the decree was made (a); acknowledging that it is not an application to be granted of course, for leave to amend after replication filed and subpoenas served; and that the party applying in such case is bound to show to the Court the matter of the intended amendments, not necessarily to be new matter, but neither frivolous nor vexatious. He said that this was analogous to the established practice not to dismiss at the hearing of a cause for want of parties, but to permit it to stand over for the purpose of introducing them by amendment.

1817.

The Dean and
Chapter of
CHRIST
CHURCH
v.
SIMONDS.

Sir *Samuel Romilly* and *Horne*, resisted the application, on the grounds that the matter sought to be introduced was not properly new matter; and that it was of such a nature as necessarily to call for a further answer from the Defendant.

The LORD CHANCELLOR.

I conceive this to be a motion of great importance. There is nothing in the case upon which a bill of review could be founded, supposing a decree had been made against the Plaintiffs; because it is necessary that, where an ecclesiastical body has to sell an estate for redemption of the land tax, there should be a statement made by both parties, and a valuation. The Plaintiffs say, they want these new charges to be introduced, because not so put in issue upon the present record as to be given in evidence. The Defendant insists, on the contrary, that the case on the record is already sufficiently at issue; and the new matter sought to be introduced is such as necessarily to require an answer on his part,

(a) Mitf. 78.

1817.

The Dean and
Chapter of
CHRIST
CHURCH
v.
SIMONDS.

thus making a case different from that on the record. It is impossible to look at the pleadings, and not to find that these amendments do require an answer on the part of the Defendant. The case on the record is, that the Defendant, being a lessee of the rectory, entered into an agreement for the purchase under the act for redemption of the land tax. The commissioners, under that act, require a survey and valuation to be annexed to the memorial, which constitutes in fact the contract for the purchase. This amounts, in substance, to a representation on the part both of the vendors and of the purchaser. As the case stands on the record, it is impossible to infer fraud on the part of the purchaser. All that it amounts to is a case in which the parties, whether from negligence or otherwise, at the time of the purchase, were ignorant of the real value of the estate. The object of the proposed amendments is to charge the Defendant with having made an actual misrepresentation to the surveyor, upon which his valuation was founded. This is therefore to make a new case; and it becomes a serious question, whether, after a cause has been depending ever since the year 1814, the Plaintiffs are now at liberty to amend their bill by making an entirely different case, upon grounds which, though some may come under the description of new matters ~~are~~, many of them, within their knowledge at the time the suit was instituted.

May 13.

The LORD CHANCELLOR.

This is the case of the purchase of an advowson under circumstances which oblige me to say, that the College thought it was making a reasonable and proper agreement, and from which I should not be justified (as the record now stands) in inferring that the Defendant

(the purchaser) knew he was making an unreasonable and improper one. If I were to make any inference in this case, from the circumstances on the record, it would be only that, with reference to quantity, the value of the estate had been prodigiously under-rated; — that the commissioners misunderstood the subject with the care of which they were entrusted by the legislature.

1817.
The Dean and
Chapter of
CHRIST
CHURCH.
v.
SIMONDS.

The question is, whether, in the case of a bill filed so many years after the purchase was completed, and on a motion made, in the present stage of the cause, for leave to amend, by introducing new matter, upon an allegation that the proposed amendments do not require any answer, but which are of such a nature as evidently to require an answer; the matter of the amendments consisting of the allegation of facts which it is impossible should have been unknown to the Plaintiffs at the time of the bill filed, or which, with due diligence, they might then have discovered; such a motion ought, or ought not to be granted. And I find myself placed by it in this situation — either I must refuse a motion, by the refusal of which I shall (according to the representation made by one of the parties) shut out some material circumstances as not being put in issue on the record; or else I must, by granting the motion, do that which amounts to saying that, twelve years after such dealing as that between the parties, one of them may file his bill to set aside the transaction, and, four years after that, may come here, as of course, to introduce, by way of amendment, matter which, when introduced, will make his suit substantially a new suit. I must either do this, or I must put it to the College to file a new bill. There is no excuse for the delay which has taken place, and I am afraid to establish a precedent in this case. When, therefore, it comes to that, I think it just that

1817.

The Dean and
Chapter of
CHRIST
CHURCH
v.
SIMONDS.

the Defendant should have the choice either to waive his objection in point of form, or oblige the Plaintiffs to commence proceedings afresh. Consequently, I shall not make the order unless the Defendant consents.

[The Defendant not consenting, the motion was refused, with costs.]

June 6.

RAYNES v. WYSE.

Ne exeat obtained on the filing of the bill, discharged, on the ground that the Defendant had been previously arrested at the suit of the Plaintiff for the same debt, and discharged.

Q. If the writ could be supported on affidavit of a sum alleged to be due under an agreement, the specific performance of which is resisted on the part of the Defendant?

THE Bill was for the specific performance of an agreement, by the Defendant, for the purchase of an estate from the Plaintiff for £8600, of which £3000 was to be paid on the 29th of *September*, 1814, and the remainder at the expiration of ten years, to continue in the mean time as a charge upon the premises; and it also prayed a *ne exeat*. The Defendant had entered into possession, and contracted for the sale of parts of the estate, under the agreement, subsequently to which he refused to complete the purchase, on the ground that the Plaintiff could not make a good title.

On the 7th of *October*, 1815, the Defendant was arrested at the suit of the Plaintiff, by virtue of a writ issued out of the Court of Common Pleas, and put in bail for the sum of £6000, being double the amount of the debt sworn to, which bail was afterwards discharged, the Plaintiff having discontinued his suit.

On the 10th of *October*, 1815, the Defendant was again arrested on a writ of *ne exeat regno*, obtained by the Plaintiff on an *ex parte* application upon the filing of the bill, until he should find security for £3000 not to go beyond seas, which security he obtained upon giving his bond of indemnity.

1817.
RAYNES
v.
WYSE.

The Defendant afterwards put in his Answer, to which a replication was filed, and the cause set down for hearing.

A motion was now made on the part of the Defendant, that the writ of *ne exeat* might be discharged, and the bail taken thereon exonerated; and this motion was supported by an affidavit of the above facts, and that the Defendant had no intention of quitting the realm or going beyond seas.

Sir *Samuel Romilly*, in support of the motion.

J. Martin, contra.

The LORD CHANCELLOR asked whether any case had been found in which a *ne exeat* had been maintained upon an agreement, before it has been shewn that the Plaintiff is entitled to a specific performance?

No case was produced; and the previous arrest of the Defendant, upon the action at law, was insisted upon as an additional reason against the *ne exeat*.

The LORD CHANCELLOR thought the last objection fatal. He said, if a man was once arrested, and afterwards discharged by the Plaintiff, he could never again be arrested for the same debt. That this, at least, used to be the rule at law, and he was not aware

1817.

RAYNES
v.
WYSE.

that it had been altered. The writ of *ne. exeat* was in the nature of an arrest, and therefore the same rule applied.

The writ was discharged accordingly.

April 29.

BRUCE v. WEBB and Others.

Motion to discharge an order for an Injunction, and to set aside an Attachment on which the Injunction had issued, refused; the answer having been sworn on the evening before, but not filed until after, the Injunction issued.

A Plaintiff is entitled to the common Injunction immediately on the Attachment issued.

MOTION, by *Hart*, for the Defendant *Webb*, that an Order, which had been obtained on the 23d instant, for an injunction on an attachment for want of answer, might be discharged, and the injunction dissolved; and that the attachment might in like manner be discharged; the answer having since come in. The circumstances were, that on the 22d, at six o'clock in the evening, the answer was sworn at the Master's house, and there left, the clerk of the public office being informed of it. At ten o'clock in the morning of the 23d, the Plaintiff's solicitors caused their clerk in court to make inquiry whether the answer was filed; and, at eleven o'clock in the same morning, were informed that it was not then on the file. Immediately afterwards they sent instructions to the Plaintiff's counsel to move for an injunction, (the Defendant being in contempt to an attachment,) which was done at the sitting of the Court, it being the first day of term, and the order obtained accordingly, upon which the injunction issued. At one o'clock, the Plaintiff's solicitors received a note from the Defendant's solicitors, informing them of the above circumstances, and that the delay in filing the answer arose

from the Master being from home when the clerk in the public office called for the answer, but that it would then be put on the file within a few minutes.

1817.

 BRUCE
 v.
 WEBB.

Wetherell and *Courtenay*, for the Plaintiff, insisted that the answer not being actually on the file when the injunction was moved for, the order was strictly regular. That for such a purpose, an answer, although sworn, and in the Master's office, is not to be considered as an answer until it is of record.

The LORD CHANCELLOR.

The practice is, that, after an answer is sworn, the Master will not part with it out of his hands except to the clerk of the public office; and it was owing to this not having been done in time that the answer was not on the file previous to the order for the injunction. In the case of *King v. Harrison*, in 1810, I myself made the order that, the instant an attachment is issued, the Plaintiff is entitled to his injunction, although in that case the answer had come in the evening before the injunction was moved for.

The motion was accordingly refused, but without costs; His Lordship adding, however, that from this time forward, the practice is to be considered as established.

Afterwards, on the same day, the counsel for the Defendant moved for, and obtained, the usual order *nisi* for dissolving the injunction. (a)

(a) Reg. Lib. 1816. A. fo. 752. 887.

1817.

May 10.

VIPAN v. MORTLOCK.

The common Injunction having been dissolved upon the coming in of the answer, and the Bill being subsequently amended, the Injunction was revived upon special application, supported by affidavit of the facts stated by way of amendment, the Defendant being in default (though not in contempt) for not answering the amended Bill.

THE Plaintiff had obtained the common injunction to stay proceedings at law upon an attachment for want of answer. Upon the answer being put in, the injunction was dissolved, no cause being shown against it. The Plaintiff afterwards amended his bill; and the Defendant, having in the mean time obtained a verdict, the Plaintiff now moved specially for an injunction to restrain him from taking out execution, upon an affidavit of the material facts stated in the bill by way of amendment. The Defendant was in default for not answering the amended bill, but no attachment had issued.

Sir Samuel Romilly and Newland, in support of the motion, cited *James v. Downes*. (a)

Girdlestone opposed the motion, on the ground that the injunction could not be granted until the Defendant was actually in contempt; and that he was not in contempt until an attachment had issued.

The LORD CHANCELLOR held, that it was enough if the Defendant was in default for not answering, although not actually in contempt; and accordingly granted the motion.

June 21.

The Defendant having put

The Defendant, having put in his answer to the amended bill, now moved, upon notice, to dissolve this

(a) 18 Ves. 522.

injunction absolutely in the first instance, alleging, as a ground for the application, that the injunction sought to be dissolved was not the common injunction for want of an answer, but a special injunction. This was opposed, on the ground that the answer put in was excepted to for insufficiency.

Sir S. Romilly and Newland shewed the exceptions for cause.

This is not a new injunction, but the old order revived, and it is in terms to be continued until the Defendant shall have *fully* answered the amendments, or until further order. It cannot be ascertained whether these terms have been complied with except upon a reference to the Master; and the practice is that an answer to which exceptions have been taken is presumed to be insufficient till reported sufficient.

Hart and Girdlestone, in support of the motion.

This is alleged to be a mere question of practice, and as such, it is entirely new. The terms of the common injunction are "till answer, and further order," and there must be some substantial reason for the difference in the form of the present. That it is not the old order revived, but an entirely new injunction, appears from the case cited on the former occasion. (a) At the same time we admit that there is no case to be found exactly similar to the present, the order itself being of very rare occurrence.

Sir S. Romilly in reply.

Whether this is the common, or a special injunction, does not depend on the use of the word "and" or "or" in the terms of the order, but on the circum-

1817.

VIPAN

v.

MORTLOCK.

in his answer to the amended bill, which answer was excepted to, motion to dissolve the injunction absolutely in the first instance refused, the Court being unable to judge except upon reference to the Master, whether the answer is a sufficient answer.

(a) *James v. Downes*, 18 Ves. 522.

1817.
 {
 VIPAN
 v.
 MORTLOCK.

stances under which it was obtained. The very notice of the present motion shews the grounds, upon which alone the Defendant supposes that he can have a right to get the injunction dissolved. It is, "the Defendant having *fully* answered." When it has been once decided, as in *James v. Downes* (a), and *Edwards v. Edwards* (b), that the Plaintiff is entitled to an injunction of this kind, it must follow that he is placed in exactly the same situation as the common injunction would have placed him in. *Bagster v. Walker*. (c)

Hart, on the other side, referred to *Travers v. Lord Stafford*. (d)

The LORD CHANCELLOR.

This is the first time that I recollect such a question to have been agitated.

The Motion being to dissolve the injunction, I must take it that the injunction itself was properly granted. In the common case, such an injunction may frequently expose a Defendant to much inconvenience, but the question is, whether it is not better that some mischief should be endured in particular instances, than that the practice of the Court should be departed from. It is clear, on the other hand, that a party having no real defence either of law or equity, may frame a plausible case by way of answer, and then come into the Court with an assertion that he has fully answered, in order to procure the injunction to be dissolved. The Court itself has not the means of judging whether the assertion

(a) 18 Ves. 522.

(b) 2 Dick. 755.

(c) 1 Dick. 109.

(d) 2 Ves. 14. See also

Lady Markham v. Dickenson,
 1 Ves. j. 30. *Bliss v. Bos-*
cawen, 2 Ves. & B. 101. *Anon.*

3 Atk. 694.

is true, and can only ascertain the fact by a reference. It is on this ground, that upon an order to dissolve the injunction, unless cause shewn, the Court allows exceptions to be shewn for cause, and that, even where no exceptions are actually on the file, upon the Plaintiffs undertaking to file them immediately. Then, if upon a reference to the Master, the answer is reported sufficient, the injunction is *ipso facto* gone, and I do not conceive that an exception to the Master's report would uphold it.

1817.

 VIPAN
 v.
 MORTLOCK.

In this case, I think it was competent for the Defendant to have moved before answer to dissolve the injunction, upon affidavit in reply to that upon which the injunction was granted; and I also think — but I do not decide, because there is no necessity for deciding it — that he might, upon such affidavit, have shewn as cause for dissolving the injunction, that the matter introduced by way of amendment was in the knowledge of the Plaintiff at the time when he filed his original bill. In this case, also, the terms in which the injunction is granted are “until answer *or* further order,” which differ from the terms of the common injunction, that being (as I apprehend) “until answer *and* further order.” But, as the Defendant has chosen to embrace the alternative, and rely upon his answer alone, he puts the Court in the same situation as it stood in with respect to his answer to the original bill; it being clear, from the cases cited, that the Court, in those cases, considered it not as a new injunction, but as the old injunction revived. Then it comes to the question, whether answer is sufficient or not, and this is a point which the Court cannot decide without a reference to the Master.

The form of the common injunction on an attachment is until answer *and* further order.

See Harr.
 Cha. Pract.
 vol. ii. p. 205.

1817.

May 8.

MARY TERREWEST, Widow, and J. T. TERREWEST, (on Behalf of themselves and all other the Creditors of WATSON, Deceased, who shall come in and contribute, &c.) - - - PLAINTIFFS;

AND

ROBERT FEATHERBY, and Others,

DEFENDANTS.

Injunction after a decree to account, to restrain a creditor from proceeding at law upon a verdict which would entitle him to a judgment *de bonis propriis* against an executor; refused.

In cases where the injunction is granted, it may be obtained on the application of the Plaintiff in equity as well as of the executor. See note.

THIS was a motion, on behalf of the Defendant *Featherby*, executor of *Watson*, deceased, for an injunction to restrain a Plaintiff at law from proceeding to take out execution in an action against the Defendants, after a decree to account in a creditor's suit, according to the practice laid down in *Douglas v. Parson*. (a)

The action was commenced in *Trinity* term, 1815, upon a bond entered into by the testator, dated the 19th of *September* 1798, for £1600. The Defendant (the executor) in *Hilary* term, 1816, pleaded *Non est factum* and *Plene administravit*; upon both which pleas issue was joined, and the cause was tried at the last assizes, when a verdict was entered for the Plaintiff at law. The decree to account had only just been obtained at the time of making the motion.

Barber, in support of the motion.

Cooke, for the Plaintiff at law, opposed the motion, and cited a late case of *Brook v. Skinner* (b), in which the Lord Chancellor had refused a similar application;

(a) 8 Ves. 520.

(b) 2d April, 1816. See post. note at the end of this case.

and *Farr v. Newman* (a), in order to shew what judgment the Plaintiff at law was entitled to; viz. *de bonis Testatoris, et si non de propriis*, and costs, *de bonis propriis* in the first instance.

1817.
TERREWEST
v.
FEATHERBY.

The LORD CHANCELLOR. (b)

The Court has never interfered in the manner now sought for upon a judgment *de bonis propriis*. Is the creditor who has obtained such a judgment to be left to come in *pari passu* with the rest of the creditors? His judgment would be of no service to him, if he were delayed by a suit here until it could be ascertained whether there are assets of the testator to answer his demands; which might not be till after all chance of recovering against the executor *de bonis propriis* is entirely gone.

His Lordship added that, if he should say nothing more about the case, it must be considered that he had refused the injunction; and that it was better, in such cases, to put the executor on the necessity of acting properly in defending the action.

The case was not mentioned again.

(a) 4 T. R. 621.

(b) *Ex relatione.*

The case of *Brook v. Skinner* was that of a similar application to restrain a creditor after a decree, from proceeding at law, in an action to which the executor had pleaded *Plene administravit ultra* sufficient to pay certain specified debts of a higher nature.

Sir S. Romilly, upon a motion to discharge an order for an injunction which had been obtained, said, that in such a case the Plaintiff at law, if he falsified the plea, would be entitled to a judgment *de bonis propriis*; and therefore

1817.

TERREWEST
v.
FEATHERBY.

that the Court would not restrain him; and he referred to a case in which the Court had, a few days before, refused a similar motion, the creditors having obtained a judgment at law.

Leach and *Parker*, contra, insisted that its being a decree by consent was no objection to the application; but admitted that, if the executor had pleaded a false plea, the creditor had a right to try it at law.

The LORD CHANCELLOR said, that if the Plaintiff at law recovered a judgment *de bonis testatoris*, he would not suffer execution to be taken out on such judgment; but that if he recovered *de bonis propriis* this Court could not restrain the execution; and the order was discharged.

In *Dyer v. Kearsley* (a), the case was, that on the 16th of April, 1816, the Plaintiff had obtained the usual decree in a creditor's suit against the executors; an action being then commenced against them by another creditor, to which the executors had obtained time to plead, and, after the decree, suffered judgment to go by default: The Plaintiff in equity moved for an injunction to restrain the Plaintiff at law from taking out execution, and his motion was supported by the usual affidavit of the executors with respect to the state of the funds.

Cooke, in support of the motion.

Bell, contra, said that the executor, by obtaining time to plead, and suffering judgment to go by default, had made himself personally liable for the debts, and cited a case at the Rolls (the name of which was not mentioned) where the executor having pleaded a false plea, the Court had refused the application.

Cooke, in reply, insisted that that case was not applicable to the present where judgment had been suffered to go by default.

a May 4. 1816. Reg. Lib. A. fo. 765.

The LORD CHANCELLOR said, the executor's suffering judgment to go by default, was no more than his saying that he was ready to do whatever a court of law or equity might think proper; and granted the injunction; the Plaintiff at law to have his costs of the action up to the time when he had notice of the decree, to be paid out of the assets of the testator.

1817.

TERREWEST
v.
FEATHERBY.

It appears by the above that this injunction may be obtained upon the application of the Plaintiff in equity as well as of the executor himself. A similar order was made on the Plaintiff's application in a case of *Cox v. King*, 1st Feb. 1810.

THOMAS JACKSON - - PLAINTIFF;

June 14.

AND

SIR B. HOBHOUSE, JOHN H. MOGGRIDGE,
RICHARD PERKINS, GEORGE COX, and
MARY, his Wife, (out of the Jurisdiction,) and
JOHN LEEKE - - DEFENDANTS.

THE Defendant *Mary Cox* being entitled to the sum of £6000 under the will of *Samuel Neate* (her Settlement by a husband of money, in trust to pay the inte-

rest to the wife during her life, with a proviso against anticipation. The husband joins with a surety in a covenant to pay an annuity, secured by an assignment by the wife of the interest to become due, and of the principal sum in the event of there being no children of the marriage. Held, the surety not entitled to any remedy in equity under the assignment in respect of his payment of the arrears of the annuity recovered against him by an action upon the covenant, although he had no notice of the proviso against anticipation in the settlement; a charge of fraudulent concealment not being sufficiently established. And even if fraud had been fully made out against the wife, it seems that it would not be sufficient to support the assignment, which would be to give her a power of alienation against the intention of the settlor.

1817.

JACKSON

v.

HOBHOUSE.

late husband,) of which will the Defendants *Hobhouse*, *Moggridge*, and *Perkins* were executors, by a settlement made subsequent to her marriage with the Defendant *George Cox*, this sum was assigned to the executors, upon trust to permit the wife to receive the interest during her life to her separate use, and after her death, in case her husband should survive her, upon trust to pay the same to him during his life, and after the decease of the survivor in trust for the children of the marriage, and in case there should be no children, then for the survivor, his or her executors, &c. The settlement contained a proviso against the wife assigning or otherwise disposing of the interest of the said sum in any mode of anticipation.

Cox and his wife being afterwards desirous to raise money by way of annuity, and the Defendant *Leeke* having agreed to purchase of them an annuity, to be secured on the £6000, provided some person to be approved of by him would join with him in covenanting for the payment, they applied to the Plaintiff, who agreed to join them accordingly, and by indenture dated the 29th of *July*, 1813, to which the Plaintiff was a party, it was witnessed that, in pursuance of such agreement, and for the considerations therein mentioned, *Cox* and the Plaintiff covenanted with *Leeke* for payment to him of the annuity of £153, during the joint lives of *Cox* and his wife, and the life of the survivor, *Mary Cox*, the wife, appointing that the Defendants (the trustees in the settlement) should pay and apply the yearly interest of the £6000 during her life to *Leeke*, upon the trusts thereafter mentioned. And *Cox* and his wife thereby bargained and sold to *Leeke* the said yearly interest during their respective lives, and the principal sum to which the survivor would be entitled in the event of there being no issue of the marriage:

upon trust, in the first place, to pay himself (*Leeke*) the said annuity, and subject thereto upon the trusts of the settlement.

1817.
JACKSON
v.
HOBHOUSE.

Notice of this assignment was given to the executors, and the annuity was paid up to the 29th of *October*, 1813, only, since which time no further payments were made, and the Defendant *Leeke* brought his action against the Plaintiff upon the covenant, and recovered against him the sum of £356 for arrears of the annuity and costs.

The Plaintiff by his bill representing that the proviso in the settlement against assigning by way of anticipation had been concealed from his knowledge previous to his becoming a party to the deed of assignment (he having been induced to enter into the covenant therein contained by an opinion of counsel taken upon an abstract in which no mention was made of the proviso, and the deed of assignment itself omitting to state it); moreover, charging the Defendant *Mrs. Cox* with being privy to such fraudulent misrepresentation and concealment; prayed an account of what had accrued due on the £6000 since the date of the indenture of the 29th of *July*, 1813, and that the Defendants *Cox* and his wife, (who were out of the jurisdiction,) and the executors, might be compelled to pay to the Plaintiff the £356 so recovered against him in the said action, and to pay to the Defendant *Leeke* the residue of the interest of the £6000 upon the trusts of the indenture, and an injunction to restrain the Defendants (the executors) from parting with, or in any manner disposing of, the said principal sum of £6000, or the interest thereof, and from making any payment on account thereof to the Defendants *Cox* and his wife, or to any person for their use.

1817.

JACKSON

v.

HOBHOUSE.

The injunction was obtained upon an affidavit verifying the principal allegations in the bill, but not to the extent of charging Mrs. Cox as a party to the fraud committed; and the charge was positively and expressly denied by her answer which came in afterwards. A motion was now made, on behalf of Mrs. Cox, to dissolve the injunction.

Leach, in support of the motion, insisted that a *feme covert* can have no disposing power other than that which is expressly reserved to her, as to which a new question might be raised if a case of fraud were established against her; but that the question did not in this case arise, the affidavit in support of the injunction not bearing out, in this respect, the statement made by the bill.

Sir *S. Romilly* and *Blake*, for the Plaintiff, contended that it was a case of clear fraud, in which the wife participated; and that a *feme covert*, fraudulently contracting a debt, is personally answerable in respect of it.

Sugden, for the Defendant *Leake*. If a person, having a right to an estate, permit or encourage a purchaser to buy it of another, the purchaser shall hold it against the person who has the right, although a *feme covert*, (as in *Savage v. Foster* (a),) or under age. (b) This stands on precisely the same grounds. There is strong reason, even now, for contending against the validity of the restriction attempted to be made by the introduction of the proviso against anticipation. *Brandon v. Robinson*. (c)

(a) 9 Mod. 35. See *Evans* 97. And see *Sugd. Vend. v. Bicknell*, 7 Ves. j. 174. and *Purch.* 598.

(b) *Watts v. Creswell*, 9 Vin. (c) 1 Rose, 197.
Ab. 415., 9 Mod. 38. 96,

Abercromby, for the executors.

Leach, in reply.

The case in *Modern Reports* does not apply, for it was the case of a power. Here there is no power of disposition, but personal enjoyment only.

The LORD CHANCELLOR.

For many years after I entered into the profession, no such thing was known as a clause of restraint upon alienation of a wife's separate property by way of anticipation. The terms of the power in *Hulme v. Tenant* (a) will be remembered; and there Lord *Thurlow* held, that the bond being executed, the creditor was entitled to the benefit of its execution. Yet it is obvious that such a determination must defeat the intention with which the power was given. It was afterwards attempted, in cases like *Pybus v. Smith* (b), to be established that the alienation must be *eo modo* with the power given; that the circumstance of a direction to pay the interest from time to time into the proper hands of a married woman was enough to prevent her from having any absolute disposing power over the property, or any part, before the time of her own proper receipt of it. But this attempt also was over-ruled. Lord *Thurlow* still continued to struggle hard that the wife might be brought into a situation consistent with the manifest intention of the settlor: but he thought the decisions too strong against it. At last, he began to alter his opinion, first, in the case of *Miss Watson* (c), where he reasoned thus — a *feme covert*, having power to alien, is a mere creature of equity to the extent to

1817.
JACKSON
v.
HOBHOUSE.

(a) 1 Bro. 16.

Rockfort, 8 Ves. 164. *Parkes*

(b) 3 Bro. 340. 1 Ves. j.

v. *White*, 11 Ves. 209, &c.

189. And see *Sperling v.*

(c) See *Parkes v. White*,
11 Ves. 221, &c.

1817.

JACKSON

v.

HOBHOUSE.

which the settlement constitutes her a *feme sole*, and no farther; and he therefore thought that the Court might modify the power of alienation by such a clause as that now under consideration. Lord *Alvanley*, who followed, thought it a valid clause (a), and so it has been considered ever since. It is too late now to contend against the validity of a clause in restraint of anticipation.

We come then to the question of fraud; and that which is alleged in the present case consists in the statement which was made for counsel's opinion, containing no notice of the clause in question, the Plaintiff being alleged to have acted upon the opinion so taken. But, supposing the omission to be clearly the wife's personal fraud, the question has reference, not only to her interest, but to the intention of the author of the settlement; and it becomes a very material point to determine, whether the Court will suffer the fraud of the wife to give her a power of alienation against the intention of the settlor. I am strongly inclined to think that it never could have this effect. If it were to be so held, it would tend to induce husbands to compel their wives to join in a fraud, for the purpose of giving them such a power of alienation, since the wife may then, at any time, acquire that power by virtue of her own fraudulent act. In the cases referred to, of a married woman having a power, and of an infant, they are capable by law of conveying; the act of the latter being only voidable on his attaining full age. But the present case is different, the married woman having no power to make a conveyance. If, therefore, the fact of fraud were fully established, it would be difficult to make out the inference attempted to be derived from those cases. But,

(a) In *Sockell v. Wray*, 4 Bro. 483, &c. And see Sugd. on Powers. 109. *et seq.*

in this case, the charge of fraud is not established, and the wife cannot be considered as a *feme sole* to the extent required by the Plaintiff. The negligence of the Plaintiff, in not requiring an inspection of the settlement, has lost him the benefit which he might have derived from knowing of its provisions. There is, therefore, not enough to support the injunction.

[Injunction dissolved.]

1817.

JACKSON
v.
HOBHOUSE.

LAMBERT v. ROGERS.

July 10.

THE bill, by which the Plaintiff stated himself to be tenant in common with the Defendant of an estate of which the Defendant was in possession of the title deeds, and that he (the Plaintiff) had lately contracted to sell his share, but the purchaser refused to complete the contract without the production of a deed of settlement, (under which both Plaintiff and Defendant derived their title), prayed, that the Defendant might be ordered to permit the Plaintiff to inspect and take a copy of that deed, or otherwise might leave the same in the hands of one of the Masters for safe custody; and that the Plaintiff or his solicitor might be at liberty to inspect and take a copy, and verify the same by comparing with the original.

The Defendant, by his answer, admitted the tenancy in common, but said that he had lately sold his share of

Motion, on the part of a Plaintiff, for the production of a deed alleged to be in possession of the Defendant as tenant in common with the Plaintiff, refused, it appearing by the answer that the Defendant had sold his share, and was in possession of the deed in question only as mortgagee to the purchaser. A

mortgagee has no right to show the title of his mortgagor.

1817.

LAMBERT

v.

ROGERS.

the estate, and had now no interest therein, except by virtue of a mortgage made to him by the purchaser, for securing payment of the purchase money; that, in his character of mortgagee, but not otherwise, he then had in his possession the several title deeds relating to the estate; and admitted, that the settlement in question was also then in his possession; but submitted whether he was bound, under the circumstances, to produce or permit the Plaintiff to inspect and take a copy thereof.

A motion was now made, on the part of the Plaintiff, agreeably to the alternative prayed by the bill, that the settlement might be deposited with the Master for the purposes therein mentioned.


Bell and Bickersteth, in support of the motion.

Horne, contra.

The LORD CHANCELLOR.

As between two persons, respectively admitting themselves to be tenants in common with each other, there is no doubt that the Court will order the production of title deeds in the hands of either, for the other's inspection. But in this case, the Defendant, who has admitted himself to be tenant in common with the Plaintiff, has done that which puts an end to his obligation as tenant in common, and imposed on him a different obligation. He has sold his share of the estate, and now holds it only by virtue of a conveyance back from the purchaser by way of mortgage. The estate is the purchaser's who has made this mortgage, and a mortgagee has no right to show his mortgagor's title. It would be attended with very dangerous consequences to the security of property to make an order for the inspection under similar circumstances.

Motion refused with costs, upon the Defendant's producing an affidavit that the sale of his interest took place previous to the filing of the bill.

1817.

 LAMBERT
 v.
 ROGERS.

MORTLOCK v. LEATHES.

June 7.

THIS was a bill for an account by a Residuary Legatee against an Executor, who (it was averred) was himself indebted to the testatrix in a sum of £450.

The answer of the Executor admitted that there was an unsettled account between him and the testatrix, upon which a balance, to the amount of £368 8s. 6d. remained due to the testatrix's estate; but it went on to state that the debts of the testatrix were not all paid, and that there were several then outstanding, to which he (the Executor) was, to the extent of assets (including that balance), liable.

Hart and *Buck* moved to have the £368 8s. 6d. paid into Court.

Rose resisted this application, on the ground above stated.

The CHANCELLOR enquired when the testatrix died; and being answered, in *March*, 1814, said, that all the debts ought to have been paid; and made the order. (a)

(a) Reg. Lib. 1816. B. fo. 1019. — This note was communicated by Mr. *Rose*.

Executor admitting a balance due from him to the Testator upon an unsettled account, ordered to pay the amount into Court, notwithstanding there were debts of the Testator still outstanding; the Testator having died three years before.

1817.

April 16.

Affidavits admitted, after answer, to be read in support of a motion to pay purchase money into Court.

Defendant being in possession, and having exercised acts of ownership, payment of the money ordered, although an infant heir was a necessary party to the conveyance.

BRADSHAW v BRADSHAW and Others.

THE testator in his life-time entered into a contract with *Midgley* for sale to him of the estate in question at £6000. After the contract, he made his will, by which he left all his real estates to certain persons upon the trusts therein mentioned, and died, leaving an infant heir at law. The *Cestuis que trust* under the will filed a bill against the trustees and executors for the execution of the trusts of the will, and against *Midgley* for a specific performance of his contract. To this bill *Midgley* had put in his answer.

Agar for the Plaintiff, now moved that *Midgley* might pay his purchase-money into Court. Affidavits were read in support of the motion, stating acts of ownership alleged to have been committed by the purchaser since he was let into possession, and these were met by other affidavits under the agreement on the part of the purchaser.

Barber, for the Defendant *Midgley*, objected to the Plaintiff's affidavits being read.

THE LORD CHANCELLOR said it was now quite decided, that upon motions of this sort, affidavits of collateral circumstances might be read, and that it was a practice to be encouraged, as it shortened pleadings. (a)

Ordered that the Defendant *Midgley* should pay the £6000 into Court in six weeks. (b)

(a) See *Crutchley v. Jeringham*, post. 502.

(b) Reg. Lib. 1816. A. Fo. 1023.

1817.

BRADSHAW.

v.

BRADSHAW.

May 6.

On a notice to vary the minutes of the order made on the former motion, *Barber* stated that the Defendant *Midgley* was satisfied with the title, and would pay his purchase-money upon having a conveyance.

Agar replied that the infant heir was a necessary party, and insisted that the purchase ought to be completed, subject to his executing the conveyance when of age.

The LORD CHANCELLOR.

If Mr. *Midgley* will be satisfied with such title as the trustees are able to make, let him send a conveyance to Mr. *Agar's* client, and, if he object, I will refer it to the Master to settle it. If, however, the heir is a necessary party, you must wait until he is of age. I cannot disturb the order to pay the money into Court. You have the possession and ownership of the estate. It is strongly pressed, that it is a hardship for a man to wait, perhaps twenty years, for his conveyance. I agree that it is so; but it is the result of unavoidable circumstances, and not the fault of any body. You cannot keep the estate and money too. (a)

(a) This note was communicated by Mr. *Barber*.

1817.

June 6.

JOHN WIDDOWSON, MARY WIDDOWSON,
and ELIZABETH WIDDOWSON the younger,
Infants, by THOMAS BARKER, their next friend,
PLAINTIFFS :

AND

ROBERT DUCK, JOHN MARSHALL, and ELI-
ZABETH WIDDOWSON, the Elder,
DEFENDANTS.

Executors, having personal estate of the testator given to them by the will, upon trust to lay out on good and sufficient security, for an infant, to be paid on his coming of age after a decree to account, and after notice by the next friend of the infant Plaintiff, lending a part of such personal estate upon mortgage; ordered to pay the same into

JOHN CHESHIRE, by his will, after giving several legacies and annuities, bequeathed all the residue of his personal estate to the Defendants, *Marshall* and *Duck* (who were also named as executors), upon trust, after converting such part as should be saleable into money, to place out the same at interest upon some good and sufficient security, and to pay and apply the interest in the maintenance and education of the Plaintiff, *John Widdowson*, until twenty-one, and then to pay the principal into the hands of the said Plaintiff, for his sole and absolute use. The testator also devised all his messuages, lands, and hereditaments (except a messuage and premises devised to his sister, the Defendant, *Elizabeth Widdowson*,) to the said *Marshall* and *Duck*, their heirs and assigns, upon trust to pay and apply the rents and profits, or a competent part, towards the maintenance, &c. of the said Plaintiff, till twenty-one, the remainder to accumulate for the increase of his personal estate, and to go to the Plaintiff, as the residue of such personal estate was directed to go; and, upon his attaining

Court; but the motion asking, in the alternative, that the executors might be ordered to replace the amount by so much stock as the same would have purchased at the time of investment, was to that extent refused.

twenty-one, then upon trust to convey the same to the said Plaintiff, his heirs and assigns.

1817.
WIDDOWSON
v.
DUCK.

The testator died in *March*, 1814, and within a month after his death the bill was filed against *Duck* and *Marshall*, as executors, and *Elizabeth Widdowson* the elder, as heir at law, praying that the will might be established, and the usual accounts.

In *July*, 1814, the Defendants, *Duck* and *Marshall*, put in their answer, whereby they admitted, that the testator was at the time of his death seised of the real estates therein described, and was also possessed of personal estate, consisting of mortgages, bonds, and other securities, to a considerable amount, and of the sum of £14,000 five per cents, standing in his name; which last-mentioned sum was transferred into the name of the Accountant-General, under an order dated the 27th of *August*, 1814.

On the 25th of *February*, 1815, *Thomas Barker* (the uncle and next friend of the Plaintiffs) being informed that some monies due to the testator's estate upon bond or mortgage, had been paid off, and that the Defendants (the executors) intended to lay out the same on mortgage, served them with a notice in writing, signed by him, "not to advance or lend any sum or sums of money, which might come to their hands as such executors, either on mortgage or otherwise," but to pay the same into the bank with all convenient speed.

By the Decree, made on the 23d of *June*, 1815, it was referred to the Master to take the usual accounts, in pursuance of which the Defendants were examined on interrogatories as to the personal estate remaining outstanding; and by their examination, sworn on the

1817.

WIDDOWSON

v.

DUCK.

16th of *February*, 1816, it appeared that, notwithstanding the notice and decree, on the 8th of *August*, 1815, (two months after the date of the decree,) the Defendants had lent £3000 (part of the said outstanding personal estate) on mortgage; and, on the 17th of the same month, had lent £2000 (further part thereof) also on mortgage.

On the 11th of *April*, 1816, a petition was presented by *Barker*, on behalf of the infants, upon which the Vice-Chancellor made an order, dated the 16th of *May* following, that the Defendants (the executors) should forthwith call in the sums of £3000 and £2000 so advanced and lent by them, and receive the interest due thereon; and that they should pay the same, with the interest, into the bank, with the privity of the Accountant-General, reserving the consideration at whose expence the same were to be called in; and it was ordered that the same, when paid into the bank, should be laid out in the purchase of three per cents. in trust in the cause; and that it should be referred to the Master to enquire whether the personal estate then outstanding on securities, except the said sums of £3000 and £2000, or any and what part thereof, was fit to be so continued, and that the Defendants should forthwith call in such parts as might appear to be improperly secured, and pay the same into the bank, to be verified by affidavit.

Under this order, the Defendants had been examined on interrogatories as to the outstanding personal estate, but had not paid in the sums of £3000 and £2000, or the interest respectively due thereon.

A motion was now made, on behalf of the Plaintiffs, that the Defendants might be ordered within a month to

transfer into the name, &c. of the Accountant-General such a sum, in bank three per cents., as the £3000 would have purchased on the 8th of *August*, 1815, according to the average price of such annuities on that day, and such a sum in like Bank Annuities as the sum of £2000 would have purchased on the 17th of *August*, 1815, according, &c. together with such a sum of money as was equivalent to the dividends which would have been due on such Bank Annuities in case the same had been purchased on the said 8th and 17th of *August* respectively; but, in case the Court should not think fit to order such transfers and payments to be made as aforesaid, then that the Defendants might be ordered within a month to pay into the bank, with the privity of the said Accountant-General, the said sums of £3000 and £2000, with interest from the 8th and 17th of *August* respectively; and that the same, when so paid in, might be laid out, &c.; and that the Defendants might be ordered to pay the costs of this application, and also of the former petition.

1817.
WIDDOWSON
v.
DUCK.

By the affidavits of the Defendants in opposition to the motion, the conduct of *Barker* was represented as vexatious, and intended only to harass and disturb the Defendants in the performance of their duty as executors. It was further alleged, that the notice given by him was an improper interference on his part, and by the Defendants regarded as such, and that the sums advanced by them on mortgage were so advanced after taking professional advice on the subject, and after a valuation made of the respective securities.

The mortgagors had been served with notice immediately to pay off the respective sums in compliance with the order.

1817.

WIDDOWSON

v.

DUCK.

Sir *Samuel Romilly* and *Wray*, in support of the motion, contended that executors, having dealt improperly with an infant's estate, after a decree to account, and after notice not so to act, were bound to replace the fund so dealt with in the same situation in which it would have been if it had been properly invested in the beginning. In this case, a considerable loss had accrued, in consequence of the money being lent on mortgage, from the difference of the price of stocks.

Leach and *Spence*, contra, relied on the circumstances mentioned in the affidavit of the executors, and on the words of the will, not specifying the public funds, but directing the monies to be laid out "on good and sufficient security." They said that the authority of an executor is not put an end to by the decree to account, except on the particular points to which the decree applies. That the Court will never charge an executor or trustee to the extent sought by the present motion, unless there has been wilful and corrupt breach of trust; not in a case of mere misapprehension as to his duty.

Sir *Samuel Romilly*, in reply, said he never understood that an infant was bound by a decree, unless it were a final decree. That the direction to lay out money on good and sufficient security does not authorize a trustee to lay out money on mortgage; which was a point he considered as well settled.

The LORD CHANCELLOR.

There are many cases where, an executor, after a decree, and consequently after he might have had the directions of the Court, chusing to lay out money on mortgage, if the transaction should appear to be for the infant's benefit, the Court will give the infant the advan-

tage of it, but if otherwise, will at least consider the fund as money, and make the executor bring it into Court. The question is, whether these executors were authorized to lay out this money on mortgage after a decree. The principle acted upon by former Chancellors is, that after a decree, an executor cannot deal with the assets for the purpose of investment, without the leave of the Court. And that permission will, only on special grounds, be extended to the laying out of money on mortgage. In this case, the decree for taking the accounts contained a special provision that the Master should see which of the testator's mortgages should be called in, and which continued. The cases before Lord *Thurlow*, which I will look into, go no further, I think, than to treat the money laid out, as money in the hands of the executors, unless laid out or employed by them after an order to the contrary.

With respect to the Vice-Chancellor's order, I do not see the reason of the reservation of costs. If the executors were authorized to lend the money, they ought not to pay the costs; but if not, they must undoubtedly be put to that expense.

The LORD CHANCELLOR.

There is no case to charge these executors to the extent sought by the first part of this motion. With regard to that part of it which calls upon them to pay in the money with interest from the time of its being laid out by them, the Vice-Chancellor thought it right that the mortgages should be peremptorily called in. My opinion is, that it should be referred to option. The rule is, never to permit a trustee or executor, after a decree, to layout money on mortgage, without a previous ap-

1817.

WIDDOWSON
v.
DUCK.

June 19.

1817.

WIDDOWSON

v.

DUCK.

plication to the Court. If, then, those who represent the infants will insist on this rule, I shall not grant the motion to the full extent of replacing the stock in specie; but I think it right in the alternative.

June 7.

Ex parte PARTRIDGE and Others,

The Court has no jurisdiction to order the taxation of a solicitor's bill of costs, for business done in a cause in the Court of Great Sessions in *Wales*, where there is no detention of title deeds, nor any other matter besides costs, in dispute.

A PETITION was presented at the Rolls for a reference to the Master to tax the bill of costs of the solicitor for the petitioners, in certain causes in the Court of Great Sessions at *Cardiff*, and that the said solicitor might be directed to produce on oath all books, papers, &c. relating to such bill, or to any of the items charged therein, &c. and to deliver up all deeds, &c. in his custody or power belonging to the petitioners. The bill had been delivered towards the end of the month of *October* preceding, and, at the expiration of that month, the solicitor brought his action in the Court of King's Bench for the recovery of the amount. The application was resisted on the ground that there was no cause in Court, and that the Judges of the Court of Great Sessions, in which the whole business was done, constituted the proper jurisdiction for directing the taxation. But, on the authority of *Ex parte Uxbridge* (a), and the cases there referred to, the order was made.

Sir *S. Romilly* and *Blake*, on the part of the solicitor, now moved to discharge this order, and cited *Ex parte Wheeler*. (b)

(a) 6 Ves. 425., referring to
3 T. R. 275. 1 Stra. 628.
Mod. 339.

(b) 3 V. & B. 21.

Leach and *Phillimore*, contra, insisted that the act of parliament (a) gives jurisdiction to this Court, and in support of the order obtained, referred to *Ex parte Williams* (b), a case mentioned in *Douglas* (c), and *Lloyd v. Maund*. (d)

1817.
Ex parte
PARTRIDGE.

The LORD CHANCELLOR took time to consider, and afterwards said, he had looked into the case *Ex parte Uxbridge*, and thought that was not a sufficient authority for the order made in this case. There business had been done by a solicitor, who refused to deliver up the deeds and papers in his possession. The Court had clearly jurisdiction to order him to deliver up the deeds and papers, but, to do justice between the parties, it was necessary that any lien which the solicitor might have for costs should be first discharged, and, to ascertain the amount of such lien, taxation was requisite; so that there the taxation was consequent upon the order to deliver up the deeds and papers. But here there was no detention of deeds, as the solicitor had told the party to take them whenever he pleased; and it appeared that he had taken such as he thought proper. His Lordship added, that none of the cases referred to appeared to him to go the length of this, (viz.) to authorize the taxation of a solicitor's bill for business done in the Court of Great Sessions, where nothing beyond costs was in dispute.

The order was subsequently discharged.

(a) 2 G. 2. c. 23.

(b) 4 T. R. 496.

(c) 1 Dougl. 199. n.

(d) 1 Tidd's Prac. (last ed.) 921.

1817.

June 25.

Aug. 1.

CRUTCHLEY and Others v. JERNINGHAM.

Purchaser, (a trustee, acting on behalf of himself and others his co-trustees, and of the *Cestui que trusts*,) ordered to pay purchase-money into Court; the agreement having been entered into in the name of himself alone; upon affidavits, that the Plaintiffs (the vendors) had no notice of his acting for others, and of acts of ownership committed since possession given to him under the agreement; in opposition to the answer, alleging notice, and denying any acts of ownership by himself, or by any other person, to his knowledge.

BY articles of agreement dated the 19th of *March*, 1814, the Plaintiffs agreed to sell, and the Defendant to purchase, for £7350, to be paid as therein mentioned; and it was further agreed that the Plaintiffs should, at their respective costs, deliver to the Defendant or his solicitor, within three months, a full abstract of title, and on or before the 25th of *March*, 1815, execute proper conveyances, and deliver the title deeds, “unto and to the use of, or for, the Defendant, his heirs and assigns, or such other person or persons, use or uses, as he or they should direct,” such conveyances to be prepared at the expense of the Defendant, and to contain the usual covenants. The Defendant to enter into possession on the 25th of *March*, 1814, and to pay or allow interest upon the purchase-money, from that time until the completion of the purchase.

On the 25th of *March*, 1814, the Defendant was let into possession according to the agreement: and, within the time specified, an abstract was delivered, to the title appearing upon which abstract no objection was made on the part of the Defendant, who continued in possession, and received the rents and profits, exercising acts of ownership, as charged by the bill.

On the 7th of *March*, 1816, the purchase not being yet completed, the solicitor for the Plaintiffs wrote to the Defendant, offering to allow him time for the payment until *Lady-day*, 1817, on condition that the interest, up to *Lady-day*, 1816, should be then paid, and the subsequent interest as it should become due; to which the Defendant returned an answer, stating

his intention to perform the agreement, and pay the purchase-money at *Lady-day*, 1817, but without noticing the payment of interest. On the 7th of *May* following, another letter was written by the Plaintiffs' solicitor, requiring an explicit answer on that point, to which no answer was returned.

1817.
 CRUTCHLEY
 v.
 JERNINGHAM.

The bill, stating these facts, prayed a specific performance of the agreement.

The Defendant, by his answer, stated, that the premises were, some time previous to the agreement in question, put up for sale by public auction, in three lots, but were not sold at such auction, and that the Defendant being informed by the agent for the Plaintiffs that the same were to be sold by private contract, and being desirous, "on behalf of himself, Sir *Richard Bedingfeld*, Bart., and *Francis Hargrave*, Esq., as "trustees for the Defendant's brother, Sir *George Jerningham*," to purchase the premises comprised in lot three, it was represented to him that, if he would purchase the whole, he might easily find a purchaser for the other two lots, at such price as to bring down the purchase money for lot three to a certain sum per acre; whereupon he agreed, "on behalf of himself and his co-trustees," to purchase the whole of the premises in trust as aforesaid, and the agreement was drawn up and executed by himself and the Plaintiffs. He said that the Plaintiffs' agent treated with him as a trustee, and concluded his agreement with him in that character, and that he the Defendant "understood, and verily believed, that the Plaintiffs knew that he entered into the agreement as such trustee." He admitted his having taken possession, and received the rents and profits, "as agent of his "brother, Sir *George Jerningham*," but denied that he, or (to his knowledge) any person, "save the tenant

1817.

CRUTCHLEY
v.
JERNINGHAM.

"in possession," had exercised any acts of ownership other than by the receipt of rent, or that he or any other person (to his knowledge) had caused any trees to be felled as stated in the bill. He believed it might appear by the abstract that the Plaintiffs were able to make a good title, but said that the title had not been approved by counsel, and therefore reserved the right of objecting. That in *April*, 1815, no purchaser for the two first lots having been procured, the Defendant became desirous of abandoning the purchase, conceiving he had a right to do so upon forfeiting the deposit.

He admitted the correspondence with the solicitor for the Plaintiffs, alleging that it did not amount to a positive undertaking on his part to complete the agreement; and stated that he had, since the date of the last letter, (which he did not answer, being then abroad,) on behalf of his brother, paid the interest up to last Michaelmas. He said that, in consequence of no purchaser having been procured for the two lots, he was unable to pay the purchase-money without resorting to the sale of other estates of which he was in like manner a trustee for his brother; and submitted that *Sir George Jerningham*, and his co-trustees, ought to be made parties to the suit.

The Plaintiffs now moved that the Defendant might be ordered, within a fortnight, to pay the remainder of the purchase-money into court, with interest from Michaelmas last; and this motion was supported by affidavit, stating that the Plaintiffs had no notice of the Defendant being a trustee, or that he acted as such trustee on behalf of his brother and co-trustees, in making the purchase, until long after he had been admitted into possession, and then only as the circumstance was introduced by way of parenthesis in a letter (dated the 4th of *May*, 1816,) from the Defendant to the Plain-

tiffs' solicitor. The affidavit further stated acts of ownership, in the felling of a poplar tree by a person in the employ of the Defendant, in letting part of the estate to a former tenant at an increased rent, taking distresses, and giving notice to quit, and in letting other parts to a tenant who had underdrained the meadows, ploughed, sown, and taken crops, since the time when he entered into possession.

1817.

 CRUTCHLEY
 v.
 JERDINGHAM.

Hart and Rose, in support of the motion, stated that there were two questions: first, whether the agreement was within the statute; and, secondly, whether there were circumstances of conduct such as would lead the Court to anticipate the decree so far as to secure the purchase-money. The agreement could, for this purpose, be considered only as the agreement of the Defendant; and the acts of ownership which were alleged by the bill, although not admitted by the answer, were substantiated by affidavit, which it was competent for the Plaintiffs to read, notwithstanding the answer. *Burroughs v. Oakley*. (a)

Sir *S. Romilly* and *Blake*, contra, denied the competency of reading the affidavit; and said that, in this case, the title not having been approved, it was not ascertained that there existed such a contract as the Court would specifically perform; and, unless that was clear, the Court would never interfere to order the payment in of the purchase-money. The admission in the answer was only as to the Defendant's single belief of the sufficiency of the title; but it must first be accepted by his co-trustees. No act was proved, amounting to waiver of objection to title. The Defendant entered into possession under the agreement, which provided for his taking possession, the question of title being left

(a) *Ante*, vol. i. 52. 376.

1817.

CRUTCHLEY
v.
JERNINGHAM.

open. If the only question before the Court was that of title, the Plaintiffs were entitled to an immediate reference, and they ought therefore to set down the cause for hearing. Under similar circumstances the *Lord Chancellor* refused, in *Morgan v. Shaw (a)*, to order payment of the purchase-money, and refused it with costs.

August 1.

The LORD CHANCELLOR said, this was the case of a gentleman purchasing on behalf of himself and others, when it did not appear, on the face of the contract, that he was purchasing except for himself alone. The time fixed for the payment of the purchase-money was long since passed. A purchaser has no right to say that he will put an end to the agreement, forfeiting his deposit. Here the purchaser admitted receipt of rents and profits, notwithstanding he denied acts of ownership. But the material circumstance was, that he had admitted a good title; insisting nevertheless that he had a right to object, the title not having been approved by counsel. His Lordship was of opinion, however, that, having admitted so much, and having entered into the agreement in his own name alone, those with whom he had contracted had a right to hold him to his purchase; and that the circumstances of the case did not vary the general rule now established.

[Order to pay the money into Court before the next seal.]

(a) *Ante*, 138.

1817.

The Rev. THOMAS WILLIS, LL.D. PLAINTIFF;
 AND
 JOHN PARKINSON and ISAAC WOOD (a Lunatic), and MARGARET FOSTER, JOHN DARCY, and ELIZABETH his Wife (Committees of the said Lunatic),
 DEFENDANTS.

ROLLS,
 By consent.
 July 31.

THE bill (the prayer of which was, that a commission might issue to ascertain boundaries and distinguish the prebendal lands therein mentioned, and that the same, when so distinguished, might be held by the Defendants, separate and distinct from the other freehold and copyhold lands therein also mentioned, and, if not to be distinguished, then that the commissioners might set out from the said freehold and copyhold lands so much as could not be so distinguished, to be held by the Defendants, as lessees of the said prebendal lands under the indenture therein mentioned,) was filed by the Plaintiff, as prebendary of *Asgarby*, in *Lincolnshire*, which prebend consisted of the manor and rectory, and of various lands and tythes in the parish of *Asgarby*, with the courts leet, courts baron, and other rights and royalties belonging thereto, and was held by the Defendants under a lease granted by a former prebendary for three lives, two of which were then living, under the yearly reserved rent of £37. It appeared (by an extract from the parliamentary survey, taken in the year 1650, by the commissioners appointed by the Commons during the usurpation, in order to found an act of the Commons for the abolishing of deans and chapters,) that the prebend then consisted of certain rents due from

Commission to ascertain and distinguish boundaries, and, if not to be distinguished, to set out the value, upon a bill by a prebendary against lessees of the prebendal lands, also owners of other lands within the parish, with which the prebendal lands had become intermixed and confounded by reason of the unity of possession. See before, p. 410. *Speer v. Crawler*.

1817.

WILLIS
v.

PARKINSON.

the freeholders within the township of *Asgarby*, holden of the prebendary, as lord of the manor of *Asgarby*; of the courts baron, courts leet, fines, and other royalties appurtenant to the manor; of certain rents due from the copyholders holding by copy of court-roll, by fines and other services; of a prebendal or manor house, containing the several particulars therein stated; and of various inclosed lands, divers pieces of open field-land, in certain fields in the township of *Asgarby* (containing altogether 245 acres and 3 roods,) of certain oxgangs of land in the manor, and of the tythes of corn, hay, wool, and lambs, and all other tythes belonging to the prebendary as parson of the parish. The prebend had been uniformly leased out upon lives: and, in the various leases then existing, the same was no other ways described than in the following general manner, viz.

“ All that the prebend of *Asgarby*, in the county of
“ *Lincoln*, and all that the manor and rectory of *A-*
“ *garby* aforesaid to the said prebend belonging, with
“ all and singular the lands, arable meadows, feedings,
“ commons, courts leet, courts baron, rents, royalties,
“ services, tythes and hereditaments, to the said prebend
“ belonging, or in any wise appertaining, with all and
“ singular their appurtenances, situate, lying, and being
“ in *Asgarby* aforesaid.”

The Defendants were the owners also, by purchase, of all the freehold and copyhold lands within the parish, not included in the prebendal lease; and, in consequence of the unity of possession, it had become almost impossible to distinguish the prebendal from the other estate. The Defendants contended, that they had not blended the estates together, but that the same took place upwards of a century ago, when the whole parish

of *Asgarby* was sold by the different owners to Dr. James Gardiner, then Bishop of *Lincoln*; by which means he became sole owner, not only of the freehold and copyhold lands, but also lessee of all the prebendal lands in the parish; and that these properties having been since enjoyed as one estate, the boundaries had become intermixed, so as to prevent the distinguishing one from the other.

1817.
 WILLIS
 v.
 PARKINSON.

The Plaintiff founded his claim upon the parliamentary survey before stated, and also upon the title-deeds in the hands of the Defendants, which had been deposited with their clerk in court pursuant to an order dated the 21st of *August*, 1811, and had been inspected by the solicitors. The answers had been replied to; but the Defendants had entered into no evidence, and consented to a commission being issued for the purpose prayed by the bill.

The Plaintiff also had not examined any witnesses, intending to produce the parliamentary survey at the hearing, if required, (but which the Defendants did not require him to do,) and relying upon the evidence furnished in his favour by the Defendants' title-deeds.

The cases of *The Duke of Leeds v. The Earl of Stratford* (a), and *The Attorney-General v. Fullerton* (b), were referred to; and a Decree was made, by consent, agreeably to the following minutes:—

“Let a commission issue to inquire and ascertain which and what quantity of the lands in the possession of the Defendants, in the parish of *Asgarby*, are leasehold be-

(a) 4 Ves. 180.

(b) 2 Ves. and B. 263.

1817.

WILLIS

v.

PARKINSON.

longing to the prebend of *Asgarby*, and held by them under a lease from the prebendary thereof; and let the commissioners distinguish the prebendal lands so held by the Defendants, from the freehold and copyhold lands belonging to the Defendants in the said parish of *Asgarby*, to ascertain the respective boundaries of the prebendal and of the freehold and copyhold lands, and to distinguish, divide, and ascertain the prebendal lands by metes and bounds accordingly; and if, by reason of the confusion of boundaries, or alterations of names, or any other circumstances, the commissioners shall not be able to distinguish or ascertain the said prebendal lands, or any of them, in that case let them set out such quantity of lands, now in the possession of the Defendants within the said parish, as may be of equal value with the prebendal lands, or so much thereof as cannot be distinguished or ascertained as aforesaid. And let all deeds, books, papers, writings, plans and surveys, &c. be produced before the said commissioners upon oath, with power for the said commissioners to examine the parties and witnesses upon oath."

1817.

STURGES and Another v. BROWN and Others.

June 25.

July 15.

ROUPELL moved, that the bill might be taken *pro confesso* against the Defendant *Brown*, and set down for hearing accordingly, in default of his answer being put in and perfected on or before the 28th of *November*. The motion was supported by an affidavit, stating, that the Defendant was brought up on the 1st of *March*, by *habeas corpus cum causis*, directed to the marshal of the King's Bench, to answer for a contempt in not putting in his answer, and was thereupon ordered to be turned over to the Fleet, there to remain until he should fully answer and clear his contempt, or the Court make further order. That on the 6th of *March*, by *habeas corpus* directed to the warden of the Fleet, he was brought before Lord *Ellenborough*, C. J. and re-committed to the King's Bench, where he still remained. That in case the Defendant had remained in the custody of the warden of the Fleet, and had not put in his answer, the Plaintiff might have applied for and obtained an *alias pluries habeas corpus* before the said 28th of *November*. And this application was founded on the case of *Prennergast v. Saubergue (a)*, in which, a Defendant, having removed himself back to the King's Bench from the Fleet, in order to prevent his being brought up upon an *alias pluries habeas corpus*, it was ordered, that if he did not put in his answer by the time at which an *alias pluries* would regularly have issued, the bill should be taken *pro confesso* against him.

Defendant having been removed by *habeas corpus* from the K. B. to the Fleet prison, for contempt in not putting in his answer, and having procured himself to be afterwards re-committed to the K. B., in order to prevent an *alias pluries*, ordered that the bill should be taken *pro confesso* against him, in default of his putting in his answer by the time at which an *alias pluries* might have issued.

The circumstances under which the order was made in that case, not appearing sufficiently upon the report,

(a) 2 Dick. 535.

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1817.
 STURGES
 v.
 BROWN.

of the case in *Dickins*, the *Lord Chancellor* directed the motion to stand over, for the purpose of examining the Register's book; which having been afterwards done accordingly, His Lordship made the order upon the authority of the case cited. (a)

(a) Reg. Lib. 1816. B. 1377.

PRENDERGAST v. SAUBERGUE and Others.

Reg. Lib. B. 1776. 217.

The Defendant *Saubergue*, being in custody of the Marshal of the Marshalsea of the Court of King's Bench, it was, by order dated the 28th of *January*, ordered that a *habeas corpus cum causis* should issue to the said Marshal to bring the said Defendant to the bar of this Court, to answer his contempt for not putting in an answer to the Plaintiff's bill. On the 12th of *February* the Defendant was brought up accordingly, and persisting in his said contempt, it was then ordered that he should be turned over to the Fleet, and that a *habeas corpus cum causis* should issue, directed to the Warden of the Fleet, at the return thereof, to bring the Defendant to the bar, to answer his said contempt. The Defendant, on the same evening, procured himself to be removed back to the King's Bench, by *habeas corpus*, in order to elude the process of the Court. Wherefore it was prayed that the bill might be ordered to be taken, as against him the said Defendant, *pro confesso*, unless he would consent and agree to put in his answer within such time as the Court should think reasonable. Whereupon it was ordered, that unless the answer was put in on or before the last day of term, the Plaintiff should be at liberty to apply for their clerk in Court to attend with the record of the bill, to have the same taken *pro confesso*, &c.

1817.

FERDINAND MARTIN LIEBMAN, PLAINTIFF;

AND

G. W. R. HARCOURT (deceased), DEFENDANT.

AND

The said F. M. LIEBMAN, - PLAINTIFF;

AND

JOHN MINET HENNIKER, and G. S. HARCOURT, - DEFENDANTS.

ROLLS,
July 7.

IN and previous to the month of *January*, 1811, the Plaintiff, a banker at *Vienna*, made advances in money and bills to the Dowager Countess of *Clanwilliam*, (formerly Lady *Shulldham*,) in respect of which she became indebted to the Plaintiff (as appeared by an account settled on the 18th of *January* aforesaid) in the sum of £10,800, for which she delivered to the Plaintiff a bill of exchange of the same date, payable in six months, drawn by her upon Messrs. *Drummonds*, for the amount ; and, to secure payment of that bill, deposited

By deed-poll, on the marriage of *J. S. H.*, Lady *S.* (his mother) covenants that £9,500, then due to her on mortgage, shall become the absolute property of *J. S. H.* upon her de-

cease. The mortgage being paid off, the produce is laid out in Exchequer bills, which are sold by *J. S. H.*, by virtue of a power of attorney from Lady *S.*, and the produce of those Exchequer bills laid out by him, under the same authority, in the purchase of stock in the name of Lady *S.* Lady *S.* subsequently makes an assignment of £14,948, three per cents., standing in her name, to the Plaintiff, a banker at *Vienna*, without notice of the deed-poll, as a security for advances. Upon proof that the produce of the Exchequer bills constituted a part of the stock so assigned, *held*, that the Plaintiff was not entitled to the benefit of that security, as against the personal representatives of *J. S. H.*, or those claiming after him under the settlement, to the extent of the stock proved to have been purchased with the produce of the Exchequer bills.

1817.
 LIEBMAN
 v.
 HARCOURT.

with him jewels, and executed a mortgage of an estate lately purchased by her in *Germany*; and further, by an instrument in writing, of the same date, duly executed, assigned to him the sum of £14,348, three per cents., then standing in her name as Lady *Shulldham*, widow, in the Bank of *England*, in which instrument it was expressed, that “since it might probably happen that the bill would not be accepted, in such case she assigned the said stock as a pledge for the security of the Plaintiff for the said capital sum of £10,300, with interest, commission, and all other expenses, according to the then course of exchange.” Lady *Clanwilliam* at the same time executed a power of attorney for the transfer of the said stock, which was expressed to be “in order that the proceeds might be applied in or towards the payment of the said bill of exchange.”

The bill was remitted to *London*, and presented for acceptance to Messrs. *Drummond*, who refused to accept the same; and, upon being afterwards presented for payment, refused to pay it, assigning as a reason, that they had not sufficient effects of Lady *Clanwilliam* in their hands; whereupon the Plaintiff caused the same to be protested for non-payment.

In *March*, 1811, Lady *Clanwilliam* died, and by her death the power of attorney which she had executed for transfer of the stock became void; whereupon the Plaintiff filed his bill against the Defendant, *G. W. R. Harcourt*, who had taken out administration to Lady *Clanwilliam*, for an account of what was due to him in respect of the said bill of exchange, and all charges and expenses, and that the Defendant might be decreed to pay the same; or otherwise that the £14,348 stock might be sold, and the money arising therefrom be ap-

plied in part payment of what was so due to the Plaintiff; and that the Defendant might be decreed to pay to him the remainder out of the estate come to his hands: and that he might either admit assets for that purpose, or that an account might be taken, &c.

1817.
 }
 LIEBMAN
 v.
 HARCOURT.

The Defendant, *G. W. R. Harcourt*, died before putting in his answer, whereupon a supplemental bill was filed against the Defendant *Henniker*, as administrator *de bonis non* of Lady *Clanwilliam*, and against *G. S. Harcourt*, an infant, claiming to be interested in the stock under the following circumstances:—

By a deed-poll, dated the 8th of *December*, 1800, made in contemplation of a marriage, which shortly afterwards took effect, between her son, *John Simon Harcourt* and *Elizabeth* his wife, Lady *Clanwilliam* (then Lady *Shulldham*, widow,) covenanted that the sum of £9,500, then due to her on mortgage, as residuary legatee and executrix of her late husband, Lord *Shulldham*, should immediately upon her death belong to and become the absolute property of the said *John Simon Harcourt*; and in the deed was contained also a covenant for further assurances; or that she would, in lien thereof, effectually by deed or bill, secure to be paid the like sum of £9,500 to the said *John Simon Harcourt*.

The mortgage was subsequently paid off by various instalments, from the 10th to the 27th of *November*, 1801, and the several sums so paid laid out in Exchequer bills: and on the 10th of *April* following, those Exchequer bills were sold by the order of *John Simon Harcourt*, acting by virtue of a power of attorney from Lady *Shulldham*, his mother, and the produce (amounting to £7,398) laid out in the purchase of £9,687, three per cents., in the name of Lady *Shulldham*, which,

1817.

LIEBMAN
v.
HARCOURT.

together with certain other sums of stock afterwards purchased by her, constituted (according to the Defendant's statement) the £14,348, three per cents., afterwards assigned by Lady *Clanwilliam* to the Plaintiff, as before mentioned.

The answer of the Defendant *G. S. Harcourt*, supported by the evidence of the banker's books, and of the clerks in the house, proceeded to identify the sums so invested in Exchequer bills, and afterwards laid out in the purchase of stock, with the sums paid in on account of the mortgage.

John Simon Harcourt was since dead; and his son, the Defendant *George Simon Harcourt* (an infant) became entitled under the settlement made on his father's marriage.

The supplemental bill filed by the Plaintiff, after stating the nature of the Defendant's claim, charged that, in case the said stock, or any part thereof, was purchased with the mortgage-money, yet *John Simon Harcourt* allowed the same to be invested in the name of Lady *Shulldham*, in order to enable her to procure money on the credit thereof, and so to defraud the Plaintiff; that the Plaintiff, at the time of advancing his money, had no notice of the deed-poll, or of any existing claim on the stock assigned to him, and that he made such advances upon the faith and credit of the said stock; and in full reliance that the same was the sole and absolute property of Lady *Clanwilliam*.

The Defendant *Henniker*, by his answer, denied having received any part of the personal estate of Lady *Clanwilliam*; and said, that the whole of such personal estate was not nearly sufficient to pay her debts; as to

which he referred to a suit already at issue, and in which there had been a decree for an account of such personal estate, and of the mortgage-money and subsequent investments: which suit, as was insisted by the other Defendant, rendered the present unnecessary.

1817.

 LIEBMAN
 v.
 HARCOURT.

The Defendant *Harcourt* (the infant) claimed to have a lien on the stock to the amount of what was purchased with the produce of the mortgage-money.

Since the filing of the original bill, the estate mortgaged to the Plaintiff, and all the jewels, &c. deposited with him by way of security, had been claimed by the executor of Lord *Clanwilliam* (deceased), who had instituted a suit at *Vienna* to recover the same, under which they were sold, and the produce paid into Court, where it still remained.

Sir *S. Romilly* and *Collinson*, for the Plaintiff, insisted that the equitable claim set up by the Defendant *Harcourt* was not available against the Plaintiff, in consequence of the Exchequer bills having been sold out, and the produce invested, under the authority, and by the express direction of *John Simon Harcourt*, (through whom the Defendant claimed,) who, by such dealing, would have been absolutely precluded from saying that the stock so purchased in the name of Lady *Shulldham* alone was clothed with a secret trust for him. The covenant in the deed-poll was personal in his favour, and it therefore was competent for him to bind, or to sell, his interest. So circumstanced, he directed the sale and investment, and, choosing that it should be done in Lady *Shulldham's* name only, he thereby enabled her to deal with property, as her own, in which she had in fact only a life interest, he himself being entitled to the reversion. Both Plaintiff and Defendant were equitable

1817.

LIEBMAN
v.
HARCOURT.

claimants, no legal estate in stock passing without actual transfer. The only ground on which the latter could claim a preference, was priority in point of date, the benefit of which was forfeited by the improper conduct of the party through whom he claimed, Besides, all this was on the supposition that the stock was the produce of the mortgage: whereas it was a mixed fund, and impossible to be identified.

Hart, Bell, and Pepys, for the Defendant, the infant.

The question is, whether *John Simon Harcourt* acquired an interest in these Bank annuities by a competent instrument; and, if he did so, whether he has done any thing which will induce the Court to postpone his claim? *John Simon Harcourt*, by virtue of the deed-poll made previous to his marriage, took an equitable interest in the mortgage money, subject only to that contingency, to which every equitable title is subject, of a purchaser without notice getting in the legal estate. Thus circumstanced, he is constituted by his mother, as her attorney, to get in and dispose of the money, and the identical sums paid in are traced, first to the investment in Exchequer bills, and subsequently to the purchase of Bank annuities. That money can be so traced, is sufficiently established by the cases of *Lane v. Dighton* (a), *Lord Chedworth v. Edwards* (b), &c.; and the late case of *Taylor v. Plumer*. (c) *Lady Clanwilliam* received the dividends of the stock so purchased, and thus recognised the investment, and approved of it. *John Simon Harcourt* wished his mother to have the same right over the Bank annuities, that she had over the mortgage. This is not fraud; nor to be compared to the case of a mortgagee permitting the mortgagor to

(a) Ambl. 409.

(c) 3 M. & S. 562.

(b) 8 Ves. 46.

retain possession of the title deeds, by which it may now be laid down, almost as an invariable rule, that the mortgagee affords an equity to postpone his own title. *Evans v. Bicknell.* (a)

1817.

 LIEBMAN
 v.
 HARCOURT.

Besides, the Plaintiff did not advance his money upon this security, but took the security for sums already due.

Sir S. Romilly in reply.

It has been decided, in *Lane v. Dighton*, and other cases, that, where a trustee, having trust money in his hands, has converted that money into property of another description, the *Cestuis que trust*, may follow the money so converted. But I never heard that this doctrine will apply to persons not having a trust character. It has never, for instance, been so decided in the case of a purchaser for valuable consideration. In this case the mortgage monies were not paid in to a particular account. They were paid in to a general account, and mixed with other monies. In the deed of covenant, Lady *Shulldham* promises to do all acts, that may be required, to give effect to the covenants; and it was therefore competent for *John Simon Harcourt* to have secured the fund, instead of leaving it at her disposal. How can he say, after what he has done, that he has a lien on the stock against other persons? If Lady *Shulldham* had transferred the stock, he could not have followed it. If the stock had been sold, upon what principle could he have recovered it? The question in this case is, whether, if he had a lien, he has not lost it with respect to the Plaintiff. The cases that have been cited, do not apply to this.

1817.

LIBMAN
v.
HARCOURT.

The MASTER of the ROLLS.

In specie, this seems to be a new case. There is no doubt that Lady *Skulldham's* deed-poll gave *John Simon Harcourt* an equitable interest, which would stand good against any person taking by assignment from her. The cases that have been cited, are cases in which the *Cestui que trust* were not concerned in the change of the property. *Harcourt* cannot be affected by the investment in Exchequer bills, as he was no party to that transaction. So, also, if the stock had been purchased by Lady *Skulldham* herself, that act of her's would not have defeated his equity in a question with her, or with her creditors.

The question is, whether *Harcourt's* interference in this purchase has altered his rights. He finds the money in Exchequer bills, and orders it to be invested in the funds. If it was to be so invested, I do not see how he could say that it should be invested in any other way than it actually was. He had no right to invest it in the joint names of himself and his mother, or in any other name than her's; for he acted merely as her attorney. It is argued that, by his conduct in this transaction, he consented that the stock so purchased should be considered as part of Lady *Skulldham's* general property. But he had no right to make any election on the subject, and cannot be held to have made any. By doing for his mother, what she, presumably, would have done for herself, he did not make the property more her's than it was before. He gave her no new control over it, nor any new means of practising a fraud on third persons. If he could with propriety have invested the stock in his own name, he certainly would have done it. For he was more exposed than any other person to be defrauded by its standing in her's, as his equitable title would not have availed him against a *bond fide*

transfer for a valuable consideration. In the act he did, I see no such misfeasance or laches as ought to postpone him to a subsequent assignee.

1817.
LIEBMAN
v.
HARCOURT.

I therefore think that the representative of *Harcourt* is entitled to so much of the stock as is proved to have been purchased with the produce of the mortgage money, and that the Plaintiff is entitled to the residue. The plaintiff may come in under the decree in the other cause, as a special creditor, and be examined upon interrogatories as to the other securities.

Bill dismissed.

FRANCIS SACHEVEREL STEAD, PLAINTIFF ;

AND

FRANCIS NEWDIGATE, R. SHUTTLE-
WORTH, and W. PARKER, DEFENDANTS.

ROLLS.
July 9—11.

BY articles of settlement made previous to the marriage of *Francis Newdigate* and *Elizabeth Stead*, widow, reciting that *F. N.* was seised in fee of an estate at *Feddingworth*, and entitled to the reversion in fee simple of an annuity or rent-charge of £260, issuing out of lands at *Houghton*, expectant on the death of *Sarah Nicoll*, subject to a mortgage thereof, to his mother *Millicent Newdigate*, for £2259; and reciting that *E. S.* was seised in fee of an undivided sixth part of certain lands therein mentioned, and entitled, by virtue of a settlement on her former marriage, to the sum of £4800; reciting also that it had been agreed, that

By articles previous to the marriage of *F. N.* and *E. S.* the wife grants to trustees, &c. an undivided sixth part of certain estates for eighty years, if *S. N.* should so long live, and then, upon trust, that

1817.

STEAD
v.

NEWDIGATE.

E. S. should convey her sixth part of the lands aforesaid, and that £2000 (part of the said £4800) should be assigned, upon the trusts after mentioned; and that

soon as convenient after the death of *S. N.* and after settlement made by the husband of an estate called the *F.* estate, and of a rent-charge of £260, to which he was entitled in reversion, expectant on the death of *S. N.*) absolutely to sell and dispose of the same, and apply the money arising from the sale thereof, and of the other premises after mentioned, upon the trusts after mentioned. By the same articles, the husband covenants, within two years, to convey the *F.* estate to the same trustees, upon the like trusts as were declared as to the said undivided sixth; and likewise covenants, within six months after the death of *S. N.* to settle upon them the said rent-charge upon the trusts therein mentioned. The trusts of the monies to arise by sale of all the premises directed to be sold are then declared, to the husband for life, then to the issue of the marriage, and, in default of issue, as the husband should appoint. The husband dies in the life-time of *S. N.* without issue, having by his will, after confirming the marriage articles, given to his wife all the real and personal estate, to which he became entitled by his marriage, and which should remain undisposed of at his death, and the residue of his personal estate, and appointed her his executrix, and having devised all other his real estate to his wife for life, with remainder to the Defendant.

S. N. afterwards dies. No sale takes place; and no settlement is made of the *F.* estate, according to the articles. The widow enters into possession of that estate, conceiving herself to be only entitled as tenant for life under the will of her husband; and, upon her death, the Defendant enters, as entitled in remainder under the same will.

Upon a bill filed by the executor of the widow, to whom she had devised all the residue of her estate, real and personal, claiming to have the *F.* estate sold under the covenant in the marriage articles, and the produce paid to him as part of the personal estate of the widow, it was decreed accordingly; His Honour being of opinion, that the covenant to convey being absolute and unqualified, the estate must be considered as having been converted into personalty by the marriage articles; that the testator could not be held to have elected to take it otherwise, the period of sale not having arrived when he died; that the will afforded no evidence of an intention to pass it as real estate; and, lastly, that the widow could not, by any conduct, tending to shew in what light she considered it, at all affect the question.

1817.

STEAD
v.
NEWDIGATE.

it had been likewise agreed that *F. N.* should, at the times and in the manner after-mentioned, settle and convey the *Feddingworth* estate, and the annuity of £260, upon the trusts after-mentioned: it was witnessed, that *E. S.* granted, &c. to trustees therein named, and their heirs, the said undivided sixth part, to the use of *F. N.* and *E. S.* and the survivor, for eighty years, if *Sarah Nicoll* should so long live, and, after the determination of that estate, upon trust (as soon as conveniently might be, after the death of *Sarah Nicoll*, and after settlement made and perfected by *F. N.* of the *Feddingworth* estate and annuity,) absolutely to sell and dispose of the same, and to apply the money arising therefrom, together with the £2000 (part of £4800) so agreed to be paid to them as aforesaid, and also the money arising from the sale of the *Feddingworth* estate, as after-mentioned, upon the trusts after-mentioned. The trusts of the sum of £2000 were then declared in like manner until the death of *Sarah Nicoll*; followed by a covenant by *F. N.* within two years from the time of the marriage, to convey the *Feddingworth* estate to the said trustees for forty years, (if *S. N.* should so long live,) and after the determination of the said term, to them (the said trustees) their heirs, &c. upon the trusts already declared as to the said undivided sixth: and by another covenant, within six months after the death of *Sarah Nicoll*, to settle upon them the said annuity of £260, to the use of *F. N.* for life; with remainder to the use of trustees to preserve contingent remainders; with remainder to the use of *E. S.* for life; with remainder to the use of their first and other sons in tail male, &c.; with the ultimate remainder to the use of *F. N.*, his heirs and assigns for ever. The trusts of the monies to arise by sale of the said undivided sixth part, and of the *Feddingworth* estate, and of the £2000, were declared, in the first place, upon the death of

1817.

STEAD

v.

NEWDIGATE.

Sarah Nicoll, but not sooner, to pay off the mortgage of £2259, and then, with the consent and approbation of *F. N.*, to lay out the surplus on real or government securities; to permit *F. N.* to receive the interest during his life, and after his death to pay and apply the same unto and among the children of the marriage, as therein mentioned; and, in case there should be no children of the marriage, then to pay and dispose of the whole of the trust-moneys to *F. N.*, his executors, &c.; or as he should appoint. Then followed a proviso, that, until the annuity of £260 should be settled by *F. N.* upon the before-mentioned trusts, the rents of the said undivided sixth, and of the *Feddingworth* estate, and the dividends of the £2000, should, after the death of *F. N.* be paid to *E. S.* for her life (in case she should survive him), and, after her decease, to the children of the marriage, as before directed. And the several provisions thereby made for the said *E. S.* were declared to be in bar of dower.

There was no issue of the marriage; and no settlement was executed by *Francis Newdigate* of the *Feddingworth* estate; nor was the same ever sold, in pursuance of the articles. By his will, dated the 26th of *June*, 1762, reciting that articles of agreement were entered into and executed previous to his marriage, the said *Francis Newdigate* ratified and confirmed the same, and directed that the same should be fully performed and carried into execution. And he gave and devised to the said *Elizabeth* his wife, her heirs, &c., all the real and personal estate which he had, or should become entitled to, in right of his marriage, and which should remain undisposed of at the time of his death; and, after giving to the Defendant *Newdigate*, and the heirs of his body, an estate at *Kirkballam*, together with the said annuity of £260 after the death of his wife, and direct-

1817.

 STRAD
 v.
 NEWDIGATE.

ing the household furniture, &c. in his house at *Nottingham* to go as heir-looms therewith, he gave all the residue of his personal estate, after payment of certain legacies, to his wife; and, in case his personal estate should fall short of paying the said legacies, charged all the real estates of which he was then in possession with the payment thereof. And he devised his said house at *Nottingham*, and all other his real estate, to his said wife for her life, and, after her death, to the Defendant in tail male, chargeable as therein mentioned; and appointed his wife executrix. The will contained a declaration, as to the annuity of £260 devised to the Defendant *Newdigate* after the death of the testator's wife, (reciting that his mother *Millicent* was dead, and the mortgage of £2259. 2s., vested in the testator as her executor and residuary legatee,) that, after the death of *Sarah Nicoll*, the said mortgage should be at an end, and the annuity be thenceforth discharged therefrom; and that the money due thereon, except such interest as might be due at the death of *Sarah Nicoll*, should not be considered as part of his personal estate.

Shortly afterwards the testator died, leaving *Robert Parker* his heir at law, who was also since dead, leaving the Defendant *William Parker* his heir at law.

Sarah Nicoll survived the testator, and died in 1765.

Upon the death of the testator, his widow entered into possession of the estate at *Feddingworth*, and received the rents during her life; but being (as the bill alleged) ignorant of her rights, and the Defendant *Newdigate* having represented to her, that he was entitled as tenant in tail after her death, she did not procure the estate to be sold, and delivered the title deeds to the Defendant.

1817.

STEAD

v.

NEWDIGATE.

Elizabeth Newdigate, the widow, by her will, dated the 11th of *June*, 1812, after giving certain legacies, devised and bequeathed all the residue of her estate and effects, real and personal, over which she had any power of disposal, to the Plaintiff, his heirs and executors, and appointed him executor of her will; and died shortly after.

Upon her death, the Defendant *Newdigate* entered into possession of the *Feddingworth* estate.

The Bill, stating the above facts, and representing that the *Feddingworth* estate had become, by virtue of the covenant in the marriage articles, personal estate, so far as regarded the disposition thereof, in the same manner as if the same had been actually sold; and that by virtue of the will of *Francis Newdigate*, and the said articles confirmed thereby, the widow became entitled to have the same sold upon the death of *Sarah Nicoll*, and to have the produce paid to her for her own absolute use and benefit; and that the said estate having by the said articles been impressed with the character of personal estate, and having passed as such by the will of the said *Francis Newdigate* to his widow, the same also passed as personal estate, by her will, to the Plaintiff; and the Plaintiff thereupon became entitled to have the same sold, and the produce paid to him as part of the personal estate of the widow; and that the legal estate having passed under the general devise in the testator's will to the Defendant *Newdigate*, he became and was a trustee of such legal estate for the Plaintiff; prayed a declaration accordingly, and an account of rents and profits, and a conveyance.

The Defendant, by his answer, insisted upon the length of time during which the widow was in possession, without calling upon the trustees for a sale of the

1817.

STEAD

v.

NEWDIGATE.

Feddingworth estate, stating that, without the interference of the trustees, she herself, about the year 1775, sold certain other parts of the estates contained in the articles, and received the purchase-money to her own use. He submitted that she was not entitled on the death of *Sarah Nicoll*, to have the estate sold; the trusts of that estate, after the expiration of the term of eighty years being for the sole use and benefit of the testator. That, from the will of the testator, and other circumstances, it appeared that he considered it as real estate, to which he was entitled for his own benefit, and never meant that it should be converted into personalty; and that by confirming the marriage articles, and directing the same to be carried into execution, he only meant to confirm the same for the benefit of his widow; especially as the mortgage which was by the said articles provided to be paid off out of the monies arising therefrom, had been discharged by his will. That the widow herself well knew and believed such to be his intention, and accordingly often represented to the Defendant that he would be entitled to the estate after her death under the will of the testator. And he insisted that the estate therefore must, especially at such distance of time, and after such acquiescence of the widow, be considered as having passed under the devise of all other the testator's real estate. The answer proceeded to state various acts of acquiescence on the part of the widow, which it is not necessary here to particularise, such acts having taken place under a misapprehension of her rights. It denied any wilful misrepresentation as to those rights on the part of the Defendant, who was an infant of ten years old at the death of the testator.

Sir *S. Romilly*, *Cooke*, and *Farrer*, for the Plaintiff.

Where money is by Settlement directed to be laid out in land, or land to be converted into money, gene-

1817.

STEAD

v.

NEWDIGATE.

rally speaking, the property is considered in Equity as being so converted already; and, from the moment of the direction given, the money is invested with all the incidents of land, and *vice versa*. There are some exceptions to this rule, as where the party entitled to the property, having a right to elect in which shape he shall take it, has declared that election; and again, where a person, being the absolute owner, and having in himself the entire qualification both of heir and executor, makes no declaration of his intention respecting it; in which case it has been held, that it shall go according to the quality in which it was left by him at his death. *Walker v. Denne* (a), *Wheldale v. Partridge* (b), *Biddulph v. Biddulph* (c), *Kirkman v. Mills*. (d) In this case, Mr. *Newdigate* neither was absolute owner of the property at the time of his death, nor has he expressed any intention respecting the quality in which it shall pass. And, with regard to Mrs. *Newdigate's* subsequent conduct, it is perfectly immaterial. She had no election to make; and she was altogether ignorant of her rights, so as to be incapable of any determination respecting them. The Settlement had definitively impressed the estate with the character of personal, and there was no person who had any right or interest as to altering its provisions. The length of time during which the estate remained unsold, has nothing to do with the question; because Mrs. *Newdigate*, who during that time was entitled, had no power over it. To constitute the property as being at home within the meaning of the rule adopted by Lord *Thurlow* in *Pulteney v. Darlington* (e), there must not only be *jus in re* in the absolute owner, but no other person must have any outstanding *jus ad rem*. See also *Linger*

(a) 2 Ves. j. 170.

(b) 8 Ves. 227.

(c) 12 Ves. 165.

(d) 13 Ves. 338.

(e) 1 Bro. C. C. following

Chichester v. Bickerstaff, 2 Vern. 295.

v. *Sowray* (a), *Edwards v. Warwick* (b), *Oldham v. Hughes* (c), and other cases, as to the foundation of the rule and its exceptions.

1817.
 STEAD
 v.
 NEWDIGATE.

Hart, Bell, and Horne, for the Defendant *Newdigate*, insisted, that it was a case which called for the dry application of the rule, as between real and personal representatives, leaving the property as it is found at the decease of the ancestor; and argued, from the provisions of the will, and especially from that for the discharge of the mortgage, that the testator had sufficiently manifested his intention that it should be considered as of the quality in which he left it. He had the immediate, though not the entire and absolute, interest in him at the time of making his will; and, under these circumstances, the slightest indication of intention would be sufficient. With regard to the circumstances of Mrs. *Newdigate's* conduct subsequent to her husband's decease, they clearly amounted to such an acquiescence on her part, as the Court must regard in the light of evidence of her own intention in respect to the property, and of her understanding as to the testator's intention. Every thing was to be presumed against a person neglecting to assert her right for such a length of time. [The argument principally turned on the indications supposed to be afforded by the Will, and the subsequent circumstances.]

Barber, for the Defendant, the heir at law.

Sir *S. Romilly* replied.

The MASTER of the ROLLS.

The first question in this case is, Whether, by the marriage articles, the character of personalty was defi-

(a) 1 P. Wms. 172.

(b) 2 P. Wms.

(c) 2 Atk. 452. *Lechmere v. Lord Carlisle*, 3 B. Wms. 211., &c.

1817.

STEAD

v.

NEWDIGATE.

nitively impressed on the *Feddingworth* estate. The covenant to convey it to trustees within two years after the marriage, is absolute and unqualified. The trusts are specified, with reference to those declared as to the undivided sixth of certain property which constituted part of the wife's estate, which are "as soon as conveniently may be after the decease of *Sarah Nicoll*, and after settlement made of the *Feddingworth* estate, to sell and dispose of the same; and to apply the money arising therefrom," &c. [See the statement of the case, *ante*, p. 523.]

Now, as the husband was bound to convey the *Feddingworth* estate in two years after the marriage, and to settle the rent-charge in six months after the death of Mrs. *Nicoll*, it was at the latter period, supposing the husband to have executed his covenant, that the sale of that estate was to take place. But the covenant to convey is, in Equity, equivalent to a conveyance; and I do not apprehend that, for the present purpose, it makes any difference, whether the lands are directly conveyed to trustees for sale, or covenanted to be conveyed to them for that purpose. That which is covenanted to be done, is considered as done. And the case is, therefore, the same as if a conveyance of the *Feddingworth* estate had been made, at the end of the two years, on the trusts of the settlement. When the prescribed period arrives, the trust to sell is absolute and imperative. It is not upon previous request, it is not with consent and approbation, that the sale is to be made. There is no event specified in which the sale is not to take place. The contingency of there being no children, or of all dying under twenty-one, is contemplated and provided for; but the provision is, not that in such case there shall be no sale, but that the money arising from the sale shall be paid to the husband, his executors or ad-

ministrators. I apprehend, therefore, that in contemplation of Equity, this estate is to be considered as converted into personalty.

1817.

STEAD

v.

NEWDIGATE.

Then the question is, under what description it passes by the husband's will. The period for the sale of the estate did not arrive in his lifetime, as Mrs. *Nicoll* survived him. That it remains unsold, affords therefore no argument of any election on his part to keep it as land, supposing he could have made any such election. But there was no moment of his life, at which the absolute interest in the property, whether as land or money, could be said to be his. His wife, who might insist on a sale, was alive; and there was a possibility of issue of the marriage. I do not, therefore, think it can be of any consequence, what the actual state of the property was at the time of his death. But still he might dispose of his reversionary interest in the property, by whatever denomination he thought fit. And if it clearly appeared, that his meaning was that it should pass under the description of his real estate, there is nothing to prevent his intention from having effect. He disposes of all his real and all his personal estate; but I think it impossible to say, there is to be found in his will any thing, from which it can with certainty be inferred, whether he considered this reversionary interest as part of his real, or of his personal estate. From the moment when the Court determines that this was turned into personalty, the *onus* lies on the Defendant to show, with reasonable clearness, that the testator meant to pass it under a different denomination. It is not enough to fix upon an ambiguous expression, or an equivocal direction. Yet that is the utmost that is attempted to be done. For there is not a word in the will that gives any distinct designation to this particular property. The consequence is, that the law must decide whether

1817.

STEAR

v.

NEWDIGATE.

it be real or personal. But it is perhaps admitting too much, to say that the will leaves the question wholly in *equilibrio*. For it contains a ratification of the articles, and a direction that they shall be fully performed and carried into execution. He had the articles, therefore, in his view; and it is evident, from other passages, that he had a recollection of their contents. And yet, without any evidence, we are desired to say that he meant to devise, as land, what by those articles was limited, as money, to his executors and administrators. As to the widow, no conduct of her's could affect the question. It could not even show her understanding of the testator's intention, if that could be of any consequence. *Non constat*, that she knew any thing of his intention except from the will; and she probably knew nothing of the rule of law, but supposed that whatever was in fact real estate, would pass under that denomination.

Upon the whole result of the case, I am therefore of opinion, that the Plaintiff is entitled to the decree he asks.

1817.

JONES and Wife v. TUCKER.

Rolls,
July 30.

MARY MONES, by her will, gave and devised all her freehold and copyhold estates to the use of the Defendant *Tucker*, his heirs and assigns, upon trust to permit *Elizabeth Smith*, widow, to receive the rents, &c. for her life, for her own use and benefit; and, after her death, upon trust to sell and dispose of the same, and out of the produce thereof (among other things) to pay, and the testatrix thereby bequeathed, £100, "to such person or persons as the said *Elizabeth Smith* should "by her last will appoint;" and, subject to the payment thereof, and of certain other sums thereby given, the testatrix gave and devised the said estate to the Defendant, his heirs and assigns, and appointed him sole executor.

Elizabeth Smith survived the testatrix *Mary Mones*, and made her will as follows: "I will and bequeath to "Mrs. *Mary Jones* (the Plaintiff) the sum of £100, "likewise the whole of my household furniture, plate, "and linen, &c. Whatever remains to me for rent "from Mr. *Tucker*, is to discharge my rent and funeral. "I likewise appoint the aforesaid *Mary Jones* to be my "sole executor. And if the said *Mary Jones* should "decease, her husband Mr. *Richard Jones* to execute "instead."

M. M. gives to the Defendant all her freehold and copyhold estates, upon trust to permit *E. S.* to receive the rents, &c. during her life; and, after her death, to sell, and out of the produce to pay £100 to such person as she should by will appoint. *E. S.*, by will, without reference to the power, gives £100, and the whole of her household furniture, to the Plaintiff. It was charged by the bill, and not denied, that the testatrix had no

personal property, at the time of her death, besides some household furniture to a very small amount in value; but no evidence was gone into, and an inquiry was asked as to the state of the property at the time of making the will, with the view of ascertaining that the testatrix must have intended the gift of the £100, as in execution of her power. But the Inquiry was refused, and the Bill dismissed.

1817.

JONES

v.

TUCKER.

Elizabeth Smith died on the 7th of *March*, 1814, and the Plaintiff *Mary Jones* proved the will.

The Bill, charging that *Elizabeth Smith*, at the time of her death, was not possessed of, or entitled to any personal estate whatever, except a few articles of household furniture, which were shortly afterwards sold by the Plaintiffs for £13, and the produce applied in payment of her funeral expences; and that she had often, before she made her will, expressed and declared it to be her intention to give to the Plaintiff *Mary Jones* the sum of £100, over which the power of appointment was given her by the will of *Mary Mones*; and that, in making her will, she particularly instructed the person who prepared it, that the said sum of £100, so charged on the freehold and copyhold estates, should be thereby disposed of and given to the Plaintiff; prayed that the Defendant might be decreed to pay the same accordingly; or that so much of the three per cents. (whereon the produce of the estates sold had been invested) as was necessary, should be sold, and the £100 paid thereout.

The Defendant, by his answer, submitted that the £100 given by the will of *Elizabeth Smith* was not an appointment of the £100 under the will of *Mary Mones*, but a general legacy; and said that, so far from having made (in the Defendant's presence, or to his knowledge) any such declarations of intention as in the bill stated, *Mrs. Smith* had since the date of her will, expressed a wish to sell the reserved sum of £100, and had even offered the same for sale accordingly.

No evidence was gone into; and the bill not having put in issue the fact that *Mrs. Smith* had no other property but the furniture, which was sold, at the time of making her will, a motion had been made before the Lord

Chancellor, for liberty to amend, by inserting a charge to that effect; but which was refused, the cause being already set down for hearing; and it now came on to be heard upon bill and answer.

1817.
 JONES
 v.
 TUCKER.

Sugden, for the Plaintiffs, argued that, although it was too late, in ordinary cases, to contend that a general residuary bequest, not referring to the power, or to the subject over which the power is to be exercised, can amount to an execution of the power (a), yet the rule is liable to exception in cases where an indication of intention can be sufficiently collected; as in this case, where there was a single legacy of the precise sum over which the power was given, and no property, out of which it could be satisfied, without resorting to that which was the subject of the power. This was a general power of appointment, not specifying either the objects, or the form, of the appointment; although, as the power is preceded by a life interest in the property, it cannot be viewed as amounting to an absolute gift. The household furniture, which constituted the only remaining property, was itself property derived from the testatrix, by whom the power was created. He therefore asked for a reference to inquire as to the state of the property at the time of making the will.

Cooke and *Dowdeswell*, for the Defendant.

If the question depends upon the state of the property at the time of making the will, we agree that there must be a reference. But, supposing the fact as to that question established, the principles of the Court are against the inference which is meant to be drawn from it. The disposition, in order to its being effectual as an execution of the power, must be such as to show clearly

(a) See *Sugd. on Powers*, sect. 5. p. 276.

1817.

JONES
v.
TUCKER

that the testator pointed at that which was the subject of it. *Lowson v. Lowson*. (a) And see Sir Edward Clere's case (b), and *Andrews v. Emmott*. (c) Here the will disposes, apparently, of that which was the property of the testatrix. It is followed by a bequest of the household furniture, &c. which was absolutely her own. Both legacies are given in the same clause. Suppose she had no money at the time of making her will, how can the Court say she might not suppose that she should have £100 at her death? It is laid down as a rule, in *Andrews v. Emmott*, that there can be no inquiry as to the circumstances of personal property, with a view to this question. See *Nannock v. Horton*. (d) *Standen v. Standen* (e) was the case of a power over real estate. See *Bradley v. Westcott* (f), *Hales v. Margerum*. (g)

Standen replied.

The MASTER of the ROLLS.

Although the property in dispute, in this case, is of little value, the question is of considerable importance. With reference to the general rule, to which it is sought to make it an exception, it is, assuming the statement to be true, perhaps as strong a case as can be brought before the Court. If a person, having no property at all, and only a power over a certain sum of money, gives that single sum, little doubt can arise as to the intention. But the question is, how we can get at the fact, and whether there can be an inquiry for the purpose of ascertaining it. In *Andrews v. Emmott* (h), in the first instance, the Court did direct an inquiry into the state

(a) 3 Bro. 272.

(b) 6 Rep. 176.

(c) 2 Bro. 297.

(d) 7 Ves. 398.

(e) 2 Ves. j. 589. *Standen*

v. *M'Nab*, 6 Toml. Bro. P. C. 193.

(f) 13 Ves. 445.

(g) 3 Ves. 299.

(h) 2 Bro. 297.

of the property, at the time of the will being made, as well as at the time of the death. But, when the cause came on for further directions, *The Master of the Rolls* seems to have been of opinion, that the *quantum* of property was not a fit subject for inquiry. I agree that that was a weaker case than the present. It was not asserted that the testator there had no personal property, but only that he had not enough to pay all he had given; which is but a slight circumstance as an indication of intention. Here it is alleged, that the testatrix had no property, except a few articles of household furniture, which she has specifically bequeathed. Some property, however, she had. She speaks of rent due to her, as well as household furniture, plate, and linen. Then, what is to be the *quantum* of property that shall furnish the criterion for deciding whether a testator, making a bequest, is or is not exercising a power? It is not like an inquiry whether there be any thing but copyhold to answer a devise of land. The question there is, whether there was any thing for the will to operate upon at the time when it was made? A will of personalty speaks at the death. The state of that description of property at the time of the will, does not furnish the same evidence as to the intention.

In the case of *Nannock v. Horton (a)*, the *Lord Chancellor*, referring to *Andrews v. Emmott (b)*, and other cases of that class, takes it to be settled "that you are not to inquire into the circumstances of the testator's property at the date of the will, to determine whether he was executing the power or not."

In my own private opinion, I think the intention was to give the £100, which the testatrix had a power to

1817.

JOHN

v.

TUCKER.

No inquiry as to the *quantum* of personal property, to determine whether a gift is, or is not, in execution of a power.

Secus, as to an inquiry whether there be any thing but copyhold to answer a devise of land; the question there being, whether there was any thing for the will to operate upon at the time when it was made; whereas a will of personalty speaks at the death.

(a) 7 Ves. 398.

(b) 2 Bro. 297.

1817.

JONES

v.

TUCKER.

dispose of ; but I do not conceive that I could judicially, declare the power to have been executed, even if the result of an inquiry should verify the representation that is made as to the state of her property.

[Bill dismissed.]

INDEX

TO THE

PRINCIPAL MATTERS:

A

ABATEMENT.

See PRACTICE, 15, &c.

ACCOUNT.

1. See PRACTICE, 16.
2. EXECUTOR, 3.

ACQUIESCENCE.

1. See DED, CONSTRUCTION OF, 1.
2. There can be no acquiescence in acts which the party is ignorant, at the time, that he has any right to dispute. *Cholmondeley v. Clinton.*
Page 362

ADMIRALTY.

See SHIPPING, 2.

AFFIDAVIT.

See VENDOR AND PURCHASER, 10.

AGREEMENT.

1. See SHIPPING, 1.
2. VENDOR AND PURCHASER, 5, 6.

VOL. II.

ALIEN.

Alien, devisee in trust to sell, joins in conveyance, and afterwards obtains an Act of Naturalisation, by which it is declared that he is "*from thenceforth* naturalised, and shall be and is enabled to ask, take, have, retain, and enjoy, &c. all lands which he may or shall have by purchase or gift of any person or persons whatsoever." This Act does not operate to confirm the title of the purchaser under a conveyance previously made. Exception to the Master's report, requiring further acts to confirm the title, over-ruled accordingly. *Fish v. Klein.*
Page 431

AMENDMENT.

1. See PRACTICE, 10.
2. ———, 29.
3. INJUNCTION, 13, 14.

N n

ANSWER.

See PRACTICE, 1.

ANNUITY.

1. After a Decree referring it to the Master to enquire whether an annuity had been properly enrolled, the Master having reported against the enrolment, it was objected by the Defendant (the annuitant), on a rehearing, that the Decree had been obtained after two several orders, made in this Court, in another cause, for payment of the annuity, and after a rule to show cause in favour of the annuity in the Court of King's Bench had been discharged. Held, not a sufficient ground for setting aside the Decree, the former cause in which those orders had been obtained not having been instituted for the purpose of setting aside the annuities, and this Court having jurisdiction, after the failure of an attempt to set aside the annuity at common law. *Angell v. Hadden.* Page 164

2. See INTERPLEADER.

3. MARRIAGE SETTLEMENT, 1.

APPEAL.

See WEST INDIES, 1.

APPROPRIATION.

See LEGACY, 3.

APPOINTMENT.

See POWER, 1, 2.

B**BANKRUPT.**

See DEBTOR AND CREDITOR, 1.

BASTARD.

Legacy "to the children of the late C. K. who shall be living at (testator's) decease." C. K. being dead at the date of the will, leaving illegitimate children, (of whom three were living at the death of the testator,) and not having, at the date of the will, nor having ever had, any legitimate children, the three illegitimate children were held to be entitled. *Lord Woodhouselee v. Dalrymple.* Page 419

Where there are not, nor ever were, nor can by possibility be, any persons strictly answering the description of children, it is necessary to resort to evidence *dehors* the will, for the purpose of finding whether there were any who had acquired the reputation of children; and it is possible for illegitimate children to acquire that reputation. *Ibid.*

BILL (AMENDMENT OF).

See PRACTICE, 29.

BILL, PRO CONFESSO.

See PRACTICE, 34.

BOND.

See DEBTOR AND CREDITOR, 1.

C**CHARITABLE USES.**

1. Petition under stat. 52 G. 3. c. 101. must have the signature of the Attorney-general, or of the Solicitor-general, in case only of there being no Attorney-general at the time. Such signature not to be affixed without the same deliberation as in the

- case of an information regularly filed. *Ex parte Skinner*. Page 453
2. The statute was meant to extend only to cases of plain breach of trust committed by persons in their character of trustees, not to the case of benefits derived from such breaches of trust by third persons. *Ibid.*
 3. An information having been filed on petition presented with the same objects, it is not for the Court to separate these objects, and to give relief upon the petition as to such as are regularly within its limits, leaving the rest to be disposed of on the information. *Ibid.*
 4. Tenant of a charity estate, provided he has acted fairly, not to be turned out of possession, or to have his lease set aside, merely on the ground of inadequacy of the rent to the value of the estate. *Ibid.*

CHARTER-PARTY.

See SHIPING, 4.

CHILDREN.

See BASTARD, 1, 2.

COMMISSION.

See MANAGER.

COMMISSION (TO ASCERTAIN BOUNDARIES).

1. Bill by Lord of the manor of *W.* against the Lord of the adjoining manor of *I.* (who was also lessee of the manor of *W.*) and against Commissioners under an Act for inclosing lands within the manor of *I.*, alleging confusion of boundaries

arising out of the union of possession of the two manors; and that the Defendants were preparing, in combination together, to set out a boundary of the manor of *I.* which would include lands belonging to the manor of *W.*, prayed a commission to set out the land lying within, and being part and parcel of, the manor of *W.* The answer of the Defendant, Lord of the manor of *I.*, set out boundaries, referring to perambulations made previous to the union of possession; and, the lease having expired since the filing of the bill, and it not being established in evidence that there was any confusion of boundaries, occasioned by default or neglect of the owners of *I.* while lessees of *W.*, the bill was dismissed, with costs as against the Commissioners, but without costs as against the other Defendant.

Jurisdiction, as to granting commission to ascertain boundaries, deduced from the writ *de rationabilibus divisio*, or that, *de perambulatione faciendâ*. Consent, the ground upon which it was first exercised; then upon the application of a party having an equitable claim, and no objection made. But a Court of Equity will not interfere between two independent proprietors, to force either to have his right so determined. *Speer v. Crawler*. Page 410

2. The circumstance of confusion of boundaries constitutes, *per se*, no ground for the interposition of the Court. *Ibid.*

3. Commission to ascertain and distinguish boundaries, and, if not to be distinguished, to set out the value, upon a bill by a prebendary against lessees of the prebendal lands, also owners of other lands within the parish, with which the prebendal lands had become intermixed and confounded by reason of the unity of possession. *Willis v. Parkinson.* Page 507

COMMISSION OF REBELLION.

(See PRACTICE, 23.)

COMPENSATION.

See ELECTION, 2.

CONDITION.

See LEGACY, 2.

CONFIRMATION.

1. See DEED (CONSTRUCTION OF).
2. RELEASE, 1.

CONTEMPT.

See PRACTICE, 34.

CONVERSION.

See MARRIAGE SETTLEMENT.

CONVEYANCE.

Where a man is called upon to join in a conveyance for the purpose of obviating a specified objection to title, he will not be bound by it as to any interest of which he has not been apprised. But, if he consents to join in the conveyance, upon being told generally that there are objections to the title, he must be taken to have enquired into the nature of those objections, and cannot

afterwards raise a question as to the extent of his information. *Braybroke v. Inskip*, cited in *Cholmondeley v. Clinton.* Page 356

COPYRIGHT.

1. See INJUNCTION, 1.
2. Injunction refused to restrain publication of a work which had been left for 23 years by the Author in the hands of a Bookseller, to whom it was originally sent with an intention of its being published; that intention being afterwards relinquished, and the work having passed into the hands of the Defendants, who published it without the consent or privity of the Author. *Southey v. Sherwood.* 435
3. Property of an Author in an unpublished work, independent of the statute. *Ibid.*
4. The Court will not interfere by injunction, upon the Author's application, to restrain the publication of a work, which is of such a nature that an action could not be maintained for damages. *Ibid.*

CORPORATION.

See PRACTICE, 22.

COSTS.

1. See PRACTICE, 15.
2. ——— 16, &c.
3. SOLICITOR, 2.

COVENANT.

1. Joint covenant of indemnity not extended in equity beyond its legal operation, there being no ground on which to infer mistake in the na-

ture of the instrument, and no previous equity entitling the covenantee to a several indemnity from each of the covenantors. *Sumner v. Powell.* Page 30

2. Not a principle of equity that every joint covenant shall be considered as if it were joint and several. *Ibid.*
3. When the obligation exists only by virtue of the covenant, its extent is to be measured only by the words of the covenant.

Different, where the obligation is independent of the particular contract, as in the cases of partnership debts, bonds, &c. *Ibid.*

4. See INJUNCTION, 4. 11.

5. MARRIAGE SETTLEMENT.

D

DEBTOR AND CREDITOR.

1. See COVENANT.
2. Debtor by bond to the separate estate of a deceased partner, not allowed in Equity to set off his bond-debt in respect of acceptances for which he had become liable to the partnership-estate, and which were proved by him under a joint commission. *Addis v. Knight.* 117
3. See INJUNCTION, 15.
4. MARRIAGE SETTLEMENT, 1.
5. _____ 2.

DECREE:

1. See LEGACY, 3.
2. PRACTICE, 16.
3. _____, 17.
4. ANNUITY, 1.

DEED (CONSTRUCTION OF).

1. *S. R.* devises, subject to a term of 200 years for raising portions, to the use of his daughter *M.* for life, remainder to the use of her first son in tail male, remainder to his cousin *J. R.* in tail, &c.; and dies, leaving his daughter *M.* his heir at law; who marries, and has one son, *G. Earl of O.*; who, upon the death of his mother, enters as tenant in tail under the will of his grandfather, suffers a recovery to the use of himself in fee, and, by deed (1781), reciting, "that he was willing and desirous that the said estates should remain in the family and blood of *S. R.*," in consideration of "the natural love and affection which he bore to his relations the heirs of *S. R.*," and "to the intent that the estates might continue in the family and blood of his late mother on the side of her father," settles the estates to the use of himself for life; remainder to the heirs of his body; for default of such issue as he should appoint; for default of appointment, "to the use of the right heirs of *S. R.*;" with a general power of revocation and new appointment.

G. Earl of O., afterwards, by deed (1785), converts the mortgage term of two hundred years into a mortgage in fee; and dies without issue, leaving *H. Earl of O.* his uncle and heir at law. Upon the death of *Earl G., C.* enters, as the then right heir of *S. R.*, and settles the estates by deed (1792).

H. Earl of O., being subsequently applied to by *C.*, on account of doubts which had arisen with regard to the effect of the deed of 1785, as a revocation of the settlement of 1781, executes a deed (1794), by which, reciting those doubts, and "that, being well satisfied that Earl *G.* did not intend to alter the uses of that settlement, he had agreed to confirm the same," it was witnessed that he, Earl *H.*, did "grant, bargain, sell, release and confirm," to the trustees of *C.*'s settlement of 1792, upon the trusts of that settlement, "in the same manner as if the deed of 1785 had not been made, and to and for no other use, intent, or purpose, whatever."

Earl *H.* dies, leaving *A.* his heir at law, and also heir at law of Earl *G.*; and having devised all the rest and residue of his real estates, in the most general terms, to *B.*

C. also dies; and, upon his death, his eldest son enters under the settlement of 1792.

Upon a bill filed by *A.* and *B.* jointly, as heir at law and devisee of Earl *H.*, stating an agreement between them to share equally, and praying a redemption and reconveyance, and (as against *C.* the son) an account of rents and profits; held, first, that by the construction of the settlement of 1781, the remainder "to the use of the right heirs of *S. R.*" vested in the settlor, as himself the right heir of *S. R.* at the date of the settlement; secondly, that the deed of 1794 did not

operate as a confirmation, except for the limited purpose expressed by the recital; and lastly, that the length of time, viz. upwards of twenty years, since *C.* entered, was no bar by analogy to the statute of limitations. Also held, that Sir *L. P.*, having advanced money to *C.*, by way of mortgage, should not be permitted to avail himself of that security, as against the Plaintiffs, upon the ground, either of want of notice or of acquiescence. *Cholmondeley v. Clinton.* Page 173

2. A deed is to be expounded according to the maker's intention. But the Court will not new model the deed itself, or alter dispositions which are in themselves clear and unambiguous, because they happen to be ineffectual to the end proposed. *Ibid.* 343

3. If the words of a deed are in themselves of doubtful signification, or there is no person to whom they can, in their strict sense, apply, it is a subject for enquiry, whether they may not be understood in a different sense. *Ibid.* 344

4. Under a settlement, the son of a second marriage held to take, as heir male of the body of father and mother, although a son by a former marriage was living, by virtue of the contract. *Seymour v. Boreman* (cited). *Ibid.* 347

5. Devise of estates in *M.* to the eldest son of the testator's son, for life, and of estates in *H.* to the second and other sons; if but one, then all the real estates to him for his life, and, "for want of heirs of

"him," to the right heirs of the testator, "his son excepted." Testator died leaving a son and daughters. Held, by the Court of K. B. that the daughters took, as *personæ designatæ*, but that judgment reversed on writ of error. *Doe v. Pugh* (cited). *Ibid.* Page 348

6. Although the general words in a deed, taken by themselves, would be sufficient to pass the whole interest which the party has to convey, yet, where it is clear that those words were used, and understood by all the parties to the deed, only in subservience to a particular purpose, they will not be held to have an effect beyond the particular purpose so intended. *Ibid.* 353

7. Tenant for life, with remainder to his son in tail, with remainder to himself in fee, devises "all his estate" to his daughters. The surviving daughter executes a general release to her brother (the tenant in tail) in words sufficient to pass the reversion in fee. A bill being filed by her to set aside this release, upon the ground that it was meant only for a particular purpose, Lord Chancellor King at first decreed in favour of the Plaintiff; and afterwards, on a rehearing, directed issues to try, *first*, whether, at the time of the execution of the deed, she knew, or was apprised of, her title under the will; *secondly*, whether she intended, by the release, to pass that reversion. And, on appeal, this decree was affirmed. *Farewell v. Coker* (cited). *Ibid.* 354

DEPOSITIONS.

See PRACTICE, 12.

DISSEISIN.

1. There can be no disseisin of an equitable estate, because disseisin must be of the entire estate, and because a tortious act cannot be the foundation of an equitable title. *Cholmondeley v. Clinton*, Page 357

2. See TRUST, 4.

DONATIO INTER VIVOS.

See WEST INDIES.

E

ELECTION.

1. By settlement on the marriage of E. G. with the Plaintiff, estates, to which E. G. was entitled as tenant in tail in remainder, are expressed to be settled, as to part, to the use of E. G. for life, remainder to the Plaintiff for life, remainder to the first and other sons of the marriage, and, as to part, to the use of E. G. for life, remainder to the first and other sons, &c. immediately on the determination of his life estate. Other estates, to which the Plaintiff was entitled in fee-simple, are by the same settlement conveyed to similar uses.

Upon the death of E. G., the Defendant (his only son and heir-at-law) enters on the estates to which he was entitled as tenant in tail under the settlement, and brings ejectments to recover possession of those to which his father was entitled as tenant in tail at the time of the settlement, and into which the Plaintiff

had entered on his death, as tenant for life under the settlement, as not having been duly conveyed to the uses of the settlement. An injunction was granted, on the ground of election, to restrain the Defendant from proceeding in these ejectments. *Green v. Green*. Page 86

2. When a party elects, under a settlement, to take one of two beneficial interests, whether he is bound in equity to give up the other absolutely, or only to make compensation; *quare*. *Green v. Green*. 93

3. The principle upon which a person is put to his election, under a contract, is, that if he will not give the price intended, he shall not have the thing contracted for. *Ibid*. 94

4. Question, as to election, different, where it arises under a will, and where under a settlement. *Ibid*. 95

5. See MARRIAGE SETTLEMENT, 3.

EQUITY.

1. See COVENANT, 1.

2. DISSEISIN, 1.

3. MORTGAGE, 1.

4. TIME, 2.

5. TRUST, 4.

6. SHIPPING, 4.

7. LIEN, 1.

8. — 2.

9. A Court of Equity is not bound to find an equitable effect for a clause in a deed, because the construction put upon it at law would leave it inoperative. *Gladstone v. Birley*.

404

10. See COMMISSION TO ASCERTAIN BOUNDARIES.

11. There are many cases in which a Court of Equity will not interfere in favour of a Plaintiff, except upon terms which could not be directly enforced against him in the character of a Defendant. *Fildes v. Hooker*. Page 427

12. See EVIDENCE.

13. MARRIAGE SETTLEMENT, 3, 4.

ESTATE.

1. See WILL, 9.

2. DISSEISIN, 1.

3. RECEIVER, 3.

4. TENANT IN COMMON, 2.

ESTATE (REAL AND PERSONAL).

1. See MARRIAGE SETTLEMENT, 4.

2. POWER, 2.

EVIDENCE.

1. See WILL, 1, 2.

2. — 5.

3. Answer to Bill by a Rector for an account of tithes, setting up a simoniacal contract, supported by evidence of the contents of a letter alleged to have been written by the witness (one of the patrons of the living) to the Plaintiff, previous to his admission to the living, containing the terms of the agreement, which were afterwards accepted, and the letter containing such acceptance subsequently returned to the Plaintiff, and destroyed by him.

On an objection to the admissibility of evidence of the letter containing

the proposal, on the ground of want of notice to the Plaintiff to produce the original, *held* that the evidence was admissible, the depositions being sufficient notice. *Wood v. Strickland.* Page 461

4. At law, such evidence would not be admissible without notice, because it not being known till the time of the trial what evidence will be offered on either side, *non constat*, otherwise, that the original might not be produced. But even at law notice is not necessary, where, from the nature of the proceeding, the party must know that the contents of a written instrument in his possession will come into question. *Ibid.*

EXAMINATION.

See PRACTICE, 12.

EXECUTOR.

1. *See WILL, 1.*
2. *INJUNCTION, 15.*
3. Executor, admitting a balance due from him to the testator upon an unsettled account, ordered to pay the amount into Court, notwithstanding there were debts of the testator still outstanding; the testator having died three years before. *Mortlock v. Leathes.* 491

4. Executors, having personal estate of the testator given to them by the will, upon trust to lay out on good and sufficient security, for an infant, to be paid on his coming of age, after a decree to account, and after notice by the next friend of the infant Plaintiff, lending a part of such

personal estate upon mortgage; ordered to pay the same into Court; but the motion asking, in the alternative, that the executors might be ordered to replace the amount by so much stock as the same would have purchased at the time of investment, was to that extent refused. *Widdowson v. Duck.* Page 494

F

FORFEITURE.

1. *See ELECTION, 2.*
2. *INJUNCTION, 11.*

FREIGHT.

1. *See SHIPPING, 4.*
2. *LIEN, 1.*

H

HABEAS CORPUS.

See PRACTICE, 34.

HUSBAND AND WIFE.

See MARRIAGE SETTLEMENT, 2.

I

INFANT.

1. Where two suits are instituted in the name of an infant by different persons, acting as his next friends, it is of course to refer it to the Master, to see which is most for the infant's profit, upon the mere allegation of the counsel, that both suits are for the same purpose; it being at the risk of the party mov-

ing, in case the allegation should prove untrue, to have the order for reference discharged with costs upon the special application of the other party.

Upon such a reference, the Master is at liberty to suggest any improvement in the frame of the suit, and to report any special circumstances that may be for the infant's benefit.

Sullivan v. Sullivan. Page 40

2. No reference upon an application by the next friend of an infant, to see whether a suit which he himself has instituted is for the infant's benefit. *Jones v. Powell.* 141

3. See EXECUTOR, 4.

INFORMATION.

See CHARITABLE USES, 3.

INJUNCTION.

1. Injunction, until answer or further order, to restrain the publication of a work as the Plaintiff's, upon affidavit by his agents, (he himself being abroad,) of circumstances making it highly probable that it was not the Plaintiff's work, and Defendant refusing to swear as to his belief that it was. *Lord Byron v. Johnston.* 29

2. Order to dismiss for want of prosecution, after the regular time elapsed, and an Injunction having issued on the merits, not to be discharged for irregularity, although obtained, upon motion by the Defendant, without notice. *Hansam v. S. London Water-Works.* 61

3. See PRACTICE, 6.

4. Remedy by Injunction to restrain an action on breach of covenant to repair, on the peculiar circumstances of the case, not amounting to neglect or surprise, and there having been no waiver or abandonment on the part of the Defendant. *Ibid.* Page 65

5. See ELECTION, 1.

6. SHIPPING, 4.

7. After decree to account, Injunction, on the application of the Defendant, to restrain the Plaintiff from proceeding at law in an action commenced pending the suit in equity. *Wilson v. Wetherherd.* 406

8. See WASTE, 2.

9. COPYRIGHT, 2, 3, 4.

10. PATENT, 1.

11. No relief by Injunction against a forfeiture for breach of covenant to keep insured. *White v. Warner.* 459

12. See PRACTICE, 30.

13. The common Injunction having been dissolved upon the coming in of the answer, and the bill being subsequently amended, the Injunction was revived upon special application, supported by affidavit of the facts stated by way of amendment, the Defendant being in default (though not in contempt) for not answering the amended bill. *Vipan v. Mortlock.* 476

14. Defendant having put in his answer to the amended bill, which answer was excepted to, motion to dissolve the Injunction absolutely in the first instance refused, the Court being unable to judge, except

upon reference to the Master, whether the answer is a sufficient answer. *Vipan v. Mortlock*. Page 477

15. Injunction after a decree to account, to restrain a creditor from proceeding at law upon a verdict which would entitle him to a judgment *de bonis propriis* against an executor, refused. In cases where the injunction is granted, it may be obtained on the application of the Plaintiff in equity as well as of the executor. *Terwest v. Featherby*. 480

INROLMENT (OF DECREE).

See PRACTICE, 17.

INROLMENT (OF DEEDS).

1. See WEST INDIES, 1.
2. ANNUITY, 1.

INTEREST.

1. See LEGACY, 6.
2. WILL, 15.

INTERPLEADER.

1. It is sufficient to support a Bill of Interpleader, that each of the Defendants has a claim to the matter in question, although one only can maintain an Action at Law, the principle being, to prevent a Plaintiff from being doubly vexed. It is therefore not necessary that he should have been actually sued. *Morgan v. Marsack*. 107
2. Upon an annuity secured by a rent-charge, which was settled in trust for a married woman, being set aside, the annuitant is not entitled to recover the consideration given

by him for the annuity out of the arrears of the rent-charge paid into Court, under a decree made upon a Bill of Interpleader, filed by the owner of the estate subject to the rent-charge. *Angell v. Hadden*. Page 169

J

JURISDICTION.

1. See SHIPPING, 2.
2. WEST INDIES, 1.
3. ANNUITY, 1.
4. COMMISSION TO ASCERTAIN BOUNDARIES.
5. SOLICITOR, 2.

L

LEASE.

See VENDOR AND PURCHASER, 5, 6.

LEASE (RENEWAL OF).

See TRUST, 1.

LEGACY.

1. See WILL, 1.
2. Legacy upon condition "that the Legatee shall change the course of life he has too long followed, and give up low company, frequenting public houses, &c." The condition is such as a Court will carry into effect; and, the evidence not being conclusive, an Inquiry was directed, following the words of the bequest. *Tattersall v. Howell*. 26
3. £3000 given by will to trustees,

upon trust to invest, and pay the interest to *A.* for life, and after her death to transfer the principal to *B.* Under a Decree, this legacy is paid into Court, and invested in stock, in the name of the accountant-general, previous to the imposition of the duty on legacies by 20 G. 3. c. 28., *B.* being then an infant, and therefore incapable of discharging the trustees.

This is a sufficient *appropriation* of the legacy within the words of the act of 48 G. 3. c. 149., "*paid, retained, satisfied, or discharged,*" before the 10th of Oct. 1808; and therefore, upon a question arising at the time of the principal becoming payable, it was determined that no legacy duty was chargeable in respect of it. *Hill v. Atkinson.*

Page 45

4. Devise of an estate, charged with two several legacies to *A.* and *B.*; and in case *A.* or *B.* die without lawful issue, then the whole of the said two legacies to go to the survivor, his executors, &c. *A.* dies without issue in the Testator's life-time. Held, the Legacy lapsed, the contingency on which it was given over being too remote.

Quære, if it had been to the survivor only, and not to his executors, &c. in which case it seems that the survivor might have taken, as a personal benefit, the failure of issue being construed to be restricted to a dying without issue in his life-time?

Quære, also, if the limitation over had been immediate on the death;

in which case it seems that it would have vested in the survivor, and not have lapsed by the death of *A.* in the Testator's life-time? *Massey v. Hudson.*

Page 130

5. Bequest of £300 to *A.*, to be paid to him, his executors, &c. within 12 months after the death of *B.* in case *B.* shall happen to survive my wife. The latter words construed with reference only to the time of payment, and not to make void the legacy, *B.* having died in the life-time of the Testator's wife. *Ibid.*
6. Where no direction is given as to surplus interest, and the capital is made payable at a future time, the surplus interest falls into the residue.

Interest of a residue goes with the capital; but not the interest of particular legacies. *Leake v. Robinson.*

384

7. See WILL, 14, 15.
8. Bequests not to individuals, but to classes of persons, not to be altered because some individuals of an intended class are incapable of taking, either into particular bequests to the individuals, or by subdividing the class itself. *Leake v. Robinson.*

390

9. See VESTING, 3.
10. PERPETUITY, 3.
11. WILL, 19, 20.
12. BASTARD, 1, 2.

LIEN.

1. There are liens, which exist only in Equity, and of which Equity alone can take cognizance; but

lien for freight is not one of them.
Gladstone v. Birley. Page 403

2. The question, whether a tradesman has a lien on goods in his hands for the general balance, or only for so much as relates to the particular goods, is decided on the same grounds at law and in equity. To extend it, the party must show an agreement, or something from which to infer an agreement. *Ibid.* 404

LIMITATIONS (STATUTE OF).

See DEED, CONSTRUCTION OF.

LUNACY.

1. Practice of making an allowance to the immediate relations of a lunatic, other than those whom the Lunatic would be bound to provide for by law, extended to the case of brothers and sisters and their children, and founded not on any supposed interest in the property, which cannot exist during the Lunatic's lifetime, but upon the principle that the Court will act with reference to the Lunatic, and for his benefit, as it is probable the Lunatic himself would have acted if of sound mind. The amount and proportions of such an allowance are, therefore, entirely in the discretion of the Court. *Ex parte Whitbread.* 99
2. Construction of the act 36 G. 3. c. 90. s. 3. directing the transfer, in certain cases, of stock standing in the name of a Lunatic or of his committee; not to extend to stock standing in the name of another, to which the lunatic is entitled as

administrator. *Ex parte Adams.*
Page 112

3. Solicitor under a commission of lunacy, not to be appointed receiver of the estate of the lunatic. *Ex parte Pincke.* 452

M

MANAGER.

See RECEIVER.

MARRIAGE SETTLEMENT.

1. See ELECTION.
2. Settlement by husband, of money, in trust to pay the interest to the wife during her life, with a proviso against anticipation. The husband joins with a surety in a covenant to pay an annuity, secured by the wife's assignment of the interest to become due, and of the principal sum in the event of there being no children of the marriage. Held, the surety not entitled to any remedy in equity under the assignment in respect of his payment of the arrears of the annuity recovered against him by an action upon the covenant, although he had no notice of the proviso against anticipation in the settlement; a charge of fraudulent concealment not being sufficiently established. And, even if fraud had been fully made out against the wife, it seems that it would not be sufficient to support the assignment, which would be to give her a power of alienation against the intention of the settlor, *Jackson v. Hobhouse.* 483

3. By deed poll, on the marriage of *J. S. H.*, Lady *S.* (his mother) covenants that £9500, then due to her on mortgage, shall become his absolute property at her decease. The mortgage being paid off, the produce is laid out in Exchequer bills, which are sold by *J. S. H.*, under a power of attorney from Lady *S.*, and the produce of those Exchequer bills laid out by him, under the same authority, in the purchase of stock in the name of Lady *S.* Lady *S.* subsequently makes an assignment of £14,348 three per cents. standing in her name, to the Plaintiff, a banker at Vienna, without notice of the deed poll, as a security for advances. Upon proof that the produce of the Exchequer bills constituted a part of the stock so assigned, *held*, that the Plaintiff was not entitled to the benefit of that security, as against the personal representatives of *J. S. H.*, or those claiming after him under the settlement, to the extent of the stock proved to have been purchased with the produce of the Exchequer bills. *Liebman v. Harcourt.*

Page 521

4. By articles previous to the marriage of *F. N.* and *E. S.*, the wife grants to trustees, &c. an undivided sixth part of certain estates for eighty years, if *S. N.* should so long live, and then upon trust, (so soon as convenient after the death of *S. N.* and after settlement made by the husband of an estate called the *F.* estate, and of a rent-charge of £260 to which he was entitled

in reversion, expectant on the death of *S. N.*) absolutely to sell and dispose of the same, and apply the money arising from the sale thereof, and of the other premises after mentioned, upon the trusts after mentioned. By the same articles, the husband covenants, within two years, to convey the *F.* estate to the same trustees, upon the like trusts as were declared as to the said undivided sixth; and likewise covenants, within six months after the death of *S. N.*, to settle upon them the said rent-charge upon the trusts therein mentioned. The trusts of the monies to arise by sale of all the premises directed to be sold are then declared, to the husband for life, then to the issue of the marriage, and, in default of issue, as the husband should appoint. The husband dies in the life-time of *S. N.* without issue, having by his will, after confirming the marriage articles, given to his wife all the real and personal estate, to which he became entitled by his marriage, and which should remain undisposed of at his death, and the residue of his personal estate, and appointed her his executrix, and having devised all other his real estate to his wife for life, with remainder to the Defendant.

S. N. afterwards dies. No sale takes place, and no settlement is made of the *F.* estate, according to the articles. The widow enters into possession of that estate, conceiving herself to be only entitled as tenant for life under the will of her hus-

band; and, upon her death, the Defendant enters, as entitled in remainder under the same will.

Upon a bill filed by the executor of the widow, to whom she had devised all the residue of her estate real and personal, claiming to have the *F.* estate sold under the covenant in the marriage articles, and the produce paid to him as part of the personal estate of the widow, it was decreed accordingly; the Court being of opinion, that the covenant to convey being absolute and unqualified, the estate must be considered as having been converted into personality by the marriage articles; that the testator could not be held to have elected to take it otherwise, the period of sale not having arrived when he died; that the will afforded no evidence of an intention to pass it as real estate; and, lastly, that the widow could not, by any conduct, tending to show in what light she considered it, at all affect the question. *Stead v. Newdigate.*

Page 521

MISTAKE.

1. See PRACTICE, 12.
2. ————21.

MORTGAGE.

1. An Equity of Redemption is, after forfeiture, a merely equitable right, and the possession of the Mortgagor is more precarious than that of any other *Cestui que trust*. In point of possession, the Mortgagor is a mere tenant at will, even in

Equity. *Cholmondeley v. Clinton.*
Page 360

2. See TRUST, 4.

3. TENANT IN COMMON, 2, 3.

4. MARRIAGE SETTLEMENT, 3.

MORTMAIN.

See WEST INDIES.

MONEY IN COURT.

See VENDOR AND PURCHASER.

N

NE EXEAT REGNO.

Writ of *Ne Exeat*, obtained on bill being filed, discharged on the ground that the Defendant had been previously arrested at the suit of the Plaintiff for the same debt, and discharged.

Quære, if the writ could be supported on affidavit of a sum alleged to be due under an agreement, the specific performance of which is resisted by the Defendant? *Raynes v. Wise.*

472

NOTICE.

1. See TRUST, 1.
2. EVIDENCE, 2.
3. MARRIAGE SETTLEMENT.

O

ORDER.

1. See INJUNCTION, 2.
2. PRACTICE, 21.

P

PARTNER.

1. See SHIPPING, 2.
2. DEBTOR AND CREDITOR, 2.
3. SHIPPING, 4.

PATENT.

The Court will not interfere by injunction to prevent the violation of an agreement, of which, from the nature of the subject, there could be no decree for a specific performance, as for instance, to restrain the Defendant from imparting the secret of an invention which had been the subject of a patent long since expired.

To support a patent, the specification should be so clear, as to enable all the world to use the invention from the moment of the expiration of the patent. *Newbery v. James.* Page 446

PERPETUITY.

1. See LEGACY, 4.
2. WILL, 3.
3. Executory devise transgressing the allowed limits is wholly void, not only for the excess, independently of the statute; but *secus*, as to executory devises within the scope of the statute. *Leake v. Robinson.* 389

PETITION.

See CHARITABLE USES, 3.

PLEA.

See PRACTICE, 10.

POSSESSION.

1. Mere possession is not sufficient at Law, to bar the claim of the true

owner, unless there has been a disseisin, or something tantamount. *Cholmondeley v. Clinton.* Page 358

2. See MORTGAGE, 1.
3. By the civil law, a mere permissive possession cannot give title by prescription. *Ibid.* 359.
4. See TIME, 2.
5. TRUST, 4, 5.

POWER.

1. *M. M.* gives to the Defendant all her freehold and copyhold estates, upon trust to permit *E. S.* to receive the rents, &c. during her life; and, after her death, to sell, and out of the produce to pay £100 to such person as she should by will appoint *E. S.* by will, without reference to the power, gives £100, and the whole of her household furniture, to the Plaintiff. It was charged by the bill, and not denied, that the testatrix had no personal property at the time of her death, besides some household furniture to a very small amount in value: but no evidence was gone into, and an enquiry was asked as to the state of the property at the time of making the will, with the view of ascertaining that the testatrix must have intended the gift of the £100 as in execution of her power. But the enquiry was refused, and the bill dismissed. *Jones v. Tucker.* 533
2. No enquiry as to the *quantum* of personal property, to determine whether a gift is, or is not, in execution of a power.

Secds as to an enquiry whether there be any thing but copyhold to answer a devise of land; the question there being, whether there was any thing for the will to operate upon at the time when it was made; whereas a will of personalty speaks at the death. *Jones v. Tucker.*

Page 537

PRACTICE.

1. The signature of counsel is necessary to an answer.

The constant and undisturbed practice of the Court is binding, as the law of the Court, without positive order. The old practice on country commissions equivalent to signature of counsel. *Brown v. Bruce.*

1

2. See INFANT, 1.

3. RECEIVER, 1.

4. VENDOR AND PURCHASER, 1.

5. INJUNCTION, 2.

6. It is not the ordinary practice to restore a bill which has been regularly dismissed for want of prosecution; but this may be done under the circumstances of the case.

Hannam v. S. London Waterworks.

63

7. The refusal of a motion to discharge an order to dismiss, does not constitute a ground to prevent the party from applying to have the bill restored. *Ibid.*

8. A bill which has been regularly dismissed will not be restored for the mere purpose of agitating the question of costs. *Ibid.*

9. See INJUNCTION, 4.

10. On a plea to a bill of discovery, the Vice-Chancellor being of opi-

VOL. II.

nion that a *Cestui que trust* could not file such a bill without the trustee; in whom the legal estate was vested, directed a case for the opinion of a Court of Law on the question where the legal estate actually was, and ordered the plea to stand over till the return of the Judges' certificate. The parties not being able to agree on the case, a motion for leave to amend the bill by adding the trustee as a Plaintiff, pending the Vice-Chancellor's order, refused. *Cholmondeley v. Clinton.*

Page 74

11. No instance of a bill of discovery being amended by adding parties as Plaintiffs. *Ibid.*

77

12. Depositions taken on the part of the Plaintiff having been suppressed, as against some of the Defendants, on the ground of no notice until after publication; upon evidence that the omission arose from a mistake committed by the clerk to the Plaintiff's solicitor, in giving, at the Examiner's office, the name of the clerk in Court for others of the Defendants, as the name of the clerk in Court for all the Defendants, in consequence of which the Plaintiff's witnesses were produced only at the seat of the clerk in Court so named; and upon the Examiner's certificate that the name of that clerk in Court only was delivered to him; the Lord Chancellor gave to the Defendants the option, either of permitting the Plaintiff to re-examine the same witnesses, or of allowing the depositions to stand, with liberty for them to cross-ex-

O o

- mine those witnesses, and to examine others.
- The Court will exercise the right of rectifying a mere slip in any of its proceedings. *Cholmondeley v. Clinton and Others.* Page 81
13. See VENDOR AND PURCHASER.
14. INTERPLEADER, 1.
15. The general rule being that there shall be no revivor for costs alone, yet, where the costs have been taxed previous to the abatement, it seems there is a right to revive merely for the purpose of having them paid; and, where the abatement has happened by the death of the party in whose favour the costs were awarded, it is the settled practice of the Court that his representative may revive for such purpose. *Lewten v. Colchester.* 113
16. Held, no revivor for costs except after decree to account; but since over-ruled. *Ibid.* 115
17. A cause is not out of Court, for this purpose, in consequence of the bill being dismissed. Enrolment of the decree not necessary to entitle the representative of a party to revive for costs. *Ibid.*
18. Revivor for costs decreed to be paid out of a particular fund, is another exception to the general rule. *Ibid.*
19. See INFANT, 2.
20. Where the Plaintiff, by an amended bill, required the Defendant to answer as to certain facts upon the inspection of papers stated to be left by the Plaintiff in the hands of his clerk in Court, the Defendant having obtained one order for time, was allowed, on affidavit that the papers were not left for inspection till some time after that order obtained, as much time in addition, without prejudice to the usual order on a second application, after that additional time was expired. *Farnsworth v. Yeomans.* Page 142
21. Mistake, in title of order for sequestration, by omission of the words "and others," allowed to be rectified by amendment, inserting the words omitted. *Lewten v. Colchester.* 595
22. *Quære*, as to the authority of commissioners under a writ of sequestration to seize books and papers, &c. belonging to a corporation. *Ibid.*
23. It appears that the commissioners have authority to break open doors in discharge of their office, by comparison with the proceeding under a commission of rebellion. *Ibid.*
24. See INJUNCTION, 7.
25. RECEIVER, 3.
26. WASTE, 2.
27. CHARITABLE USES, 3.
28. Substitution of service of subpoena to appear and answer, refused; where one Defendant resided out of the jurisdiction, and the other admitted by his answer, that he had a power of attorney from him to receive the arrears (then due) of an annuity, which it was the object of the bill to set aside. *Rickcord v. Nedriff.* 459
29. Motion for leave to amend, after replication filed, and subpoenas served, specifying the nature of the

intended amendments; and not requiring a further answer, refused; the case being that of a bill filed in 1814 to set aside a purchase made in 1799, for fraud, inferred from great undervalue, the Defendant by his answer denying knowledge of the value at the time of making the purchase, and the amendments sought to be introduced tending to fix him with the fact of such knowledge. *Christchurch v. Symonds.*

Page 467

30. Motion to discharge order for an injunction, and an attachment on which the injunction had issued, refused; the answer having been sworn the evening before, but not filed until after, the injunction issued. *Bruce v. Webb.* 474

31. A Plaintiff is entitled to the common injunction immediately on an attachment being issued. *Ibid.*

32. *See* **NE EXEAT.**

33. - **INJUNCTION**, 13, 14.

34. **VENDOR AND PURCHASER.**

10

35. Defendant having been removed by *habeas corpus* from the K. B. to the Fleet prison, for contempt in not putting in his answer, and having procured himself to be afterwards recommitted to the K. B., in order to prevent an *alias pluries*, ordered that the bill should be taken *pro confesso* against him, in default of his putting in his answer by the time at which an *alias pluries* might have issued. *Sturges v. Brown.*

PRESCRIPTION.

See **POSSESSION**, 3.

PRESUMPTION.

1. *See* **WILL**, 1.
2. —, 3.
3. —, 4.
4. **VENDOR AND PURCHASER**, 5.

R

RECEIVER.

1. Formerly a receiver was not entitled to any allowance for sums of money laid out by him on the estate without a previous order. But, according to the present practice, a reference is directed to the Master to enquire whether the transaction is for the benefit of the parties interested. *Tempest v. Ord.* Page 55
2. Manager of a *West-India* estate, although not entitled during his absence from the island to charge commission, yet is entitled to be allowed all such sums as he has reasonably paid to others to whom he has entrusted the management. *Forrest v. Elwes.* 72
3. Motion, by tenant in common, for a receiver against his co-tenant in possession, refused; not amounting to a case of exclusion. *Milbank v. Revett.* 405
4. *See* **LUNACY**, 3.

REFERENCE TO A MASTER.

1. *See* **INFANT**, 1.
2. **RECEIVER**, 1.
3. **VENDOR AND PURCHASER**, 1.
4. **SHIPPING**, 2.
5. **VENDOR AND PURCHASER**, 4.
6. **INFANT**, 4. 2.
7. **VENDOR AND PURCHASER**, 9.
8. **POWER**, 1. 2.

RELEASE.

1. See DEEDS (CONSTRUCTION OF), 1.
2. _____, 7.

REPUBLICATION.

See WILL, 10.

REVIVOR.

See PRACTICE, 15, 16.

REVOCATION.

See DEED (CONSTRUCTION OF), 1.

S

SEQUESTRATION.

See PRACTICE, 22, 23.

SET-OFF.

See DEBTOR AND CREDITOR, 1.

SETTLEMENT (VOLUNTARY).

See VENDOR AND PURCHASER, 3.

SERVICE.

See PRACTICE, 28.

SHIPPING.

1. Agreement for sale of a ship, void under the Registry Acts, for want of certificate of registry being duly recited in the memorandum of sale, although a copy of such certificate was thereto annexed.

The policy of these acts prevents a Court from looking on one who has not strictly complied with their provisions in the light of a purchaser. *Brewster v. Clarke*. Page 78

2. The Court of Admiralty is open all the year round to applications by part-owners to restrain the sail-

ing of ships without their consent, until security given to the amount of the respective shares. But where the shares are not ascertained, that Court has no jurisdiction; and, in such case the Court of Chancery will exercise a concurrent jurisdiction, by injunction, to restrain the sailing of a ship until the share of the party complaining shall be ascertained, and security given to the amount of it. In this case it was referred to the Master to make the enquiry, and settle the security. *Haly v. Goodson*. Page 77

3. Injunction to restrain the sailing of a ship, upon the application of a part-owner, refused; where the ship was intended to sail the next day, and it did not appear, by the affidavit in support of the motion, that there were any circumstances to account for the delay in making the application. *Christie v. Craig*. 137

4. Construction of a clause in a charter-party, whereby the parties "mutually bound themselves, especially the owners the ship and tackle, and the freighter the goods to be taken on board," in a penal sum, "to the true and punctual performance of every article therein contained," not to give to the ship-owners any lien in equity, on the goods brought home, either for dead freight, or demurrage.

Only one construction of the clause, at law and in equity. *Gladstone v. Birley*. 401

SHIPPING.

5. See LIEN, 1.

SOLICITOR.

1. See LUNACY, 3.
2. The Court has no jurisdiction to order the taxation of a solicitor's bill of costs, for business done in a cause in the Court of Great Sessions in *Wales*, where there is no detention of title deeds, nor any other matter besides costs, in dispute.
Ex parte Partridge. Page 500

SPECIFICATION.

See PATENT.

STATUTE.

- 48 G. 3. c. 149. See LEGACY, 3.
34 G. 3. c. 68. SHIPPING, 1.
36 G. 3. c. 90. LUNACY, 2.
9 G. 2. c. 1. WEST INDIES.
21 Jac. 1. c. 16. LIMITATIONS.
39 & 40 G. 3. c. 98. PERPETUITY, 3.
8 Ann. c. 19. COPYRIGHT, 3.
52 G. 3. c. 101. CHARITABLE
USES.

T

TENANT IN COMMON.

1. See RECEIVER, 3.
2. Motion, on the part of a Plaintiff, for the production of a deed alleged to be in possession of the Defendant as tenant in common with the Plaintiff, refused, it appearing by the answer that the Defendant had sold his share, and was in possession of the deed in question, only as mortgagee to the purchaser.
Lambert v. Rogers. 489

3. A mortgagee has no right to show the title of his mortgagor. *Lambert v. Rogers.* Page 489

TIME.

1. See DEED (CONSTRUCTION OF).
2. An equitable title may be barred by length of time, but cannot be shifted or transferred. No equity can be acquired by length of possession. *Cholmondeley v. Clinton.* 360
3. See TRUST, 5.
4. VENDOR AND PURCHASER, 5.

TITLE.

1. See VENDOR AND PURCHASER, 1.
2. ————— 3; 4.
3. POSSESSION, 3.
4. TIME, 2.
5. TRUST, 4, 5.
6. VENDOR AND PURCHASER, 5, 6.
7. ALIEN.
8. VENDOR AND PURCHASER, 9.

TRUST.

1. Settlement of a renewable lease in trust out of the rents and profits to pay the charges of renewal, and subject thereto for husband and wife successively for life, remainder to the first son at 21.

The trustees having neglected to renew, are answerable as for a breach of trust, and liable to pay to the son the amount of what he had laid out in procuring a renewal; to be repaid to them out of the estates of the tenants for life, with reference, not to the duration of their respective possession, but to the proportions in which they would actually have suffered a di-

minution of rent in case the rents had been properly applied towards the renewals.

The assignee of one of the tenants for life, with notice of the settlement, neither primarily liable, nor to be called upon by the trustees to contribute towards their repayment; but only, in case of all the other estates proving insufficient, to make good to the son the deficiency. *Montfort v. Cadogan*. Page 3

2. Upon a bare trust, no estate can be gained by disseisin, abatement, or intrusion, whilst the trust continues. *Cholmondeley v. Clinton*, *Hopkins v. Hopkins* (cit.) 358

3. See DISSEISIN.

4. *Cestui que trust*, having a substantive, independent possession, may gain the legal estate by Disseisin; but a Mortgagor cannot disseise his Mortgagee, because his possession is that of the Mortgagee. *Cholmondeley v. Clinton*. 361

5. So long as a trust subsists, the right of a *Cestui que trust* cannot be barred by the length of time during which he has been out of possession. *Ibid.* 361

6. A *Cestui que trust* can be barred only by barring and excluding the estate of his trustee. *Ibid.* 361

7. See VENDOR AND PURCHASER, 11.

V

VESTING.

1. See WILL, 8.
2. ——— 12.
3. ——— 17.

4. Where there is no gift but by a direction to transfer "from and after" a given event, the vesting must be postponed till after that event has happened, unless, from particular circumstances, a contrary intention is to be collected. *Leake v. Robinson*. Page 367

VENDOR AND PURCHASER.

1. *A.* contracts with *B.* to purchase an estate, and, after accepting the title, agrees to sell to *C.*, who refuses to complete his purchase on the ground of his having discovered a will made 80 years ago, not set forth in the abstract, but supposed to affect the title. Upon a bill for specific performance by the original vendor against *A.*, who by his answer, (which was put in, and the cause set down for hearing, before this discovery was made,) admitted the title; *quære*, if he may be allowed to set up the will as an objection to the title by a supplemental answer.

By consent of both parties, a reference was directed to the Master to inquire whether a good title could be made, regard being had to the will only. *Conset v. Barr*. 57

2. Acts of ownership, amounting to waste, by alteration and conversion of property, sufficient to induce the Court to order payment of purchase-money into Court, upon the ground that a Vendor has lien on the estate for the amount, and might have filed his Bill to restrain the Purchaser in possession from committing such acts of ownership.

Though the Bill contained no charge of such acts having been committed, the Order was made on affidavit supplying the fact: the Defendant not having answered, nor being in contempt, nor under any order for time. *Cutler v. Simons.*

Page 103

3. A Court of Equity will not assist a Vendor in defeating a prior voluntary settlement made by himself.

Purchaser objecting to title on the ground of a voluntary settlement made by the Vendor; a Bill for specific performance by the Vendor was dismissed, and an exception to the Master's report approving the title allowed. *Smith v. Garland.*

123

4. There can be no reference of title except where the title only is in dispute. *Morgan v. Shaw.*

138

5. Generally, a purchaser shall not be allowed to keep both the possession of the estate and the purchase-money; but in a case where he was willing to give up possession, which he had taken under the agreement, and it was a question whether there was a subsisting contract, the Lord Chancellor refused to order the purchase-money into Court. *Ibid.*

6. On a Bill by Vendor for specific performance of an agreement to take a lease for twenty-one years, at rack-rent; the Master having reported in favour of the title shewn by the abstract, and an exception being taken to the report; the question was, whether, where the agreement is silent, the vendor of a leasehold interest is not bound to

produce the title of his lessor? and the exception was allowed. *Fildes v. Hoaker.*

Page 424

7. Whether the interest contracted for be freehold, or leasehold for a long term of years, or a short lease at rack-rent, the party who comes for a specific performance, should be prepared to shew that he is able to give what he seeks to compel the other to take.

Quare, where the length of possession under the original lease has been such as will suffice to raise a presumption of title. *Ibid.*

8. The consequence of requiring production of the lessor's title, in the absence of any stipulation to the contrary, will be, not to render property inalienable, but only to oblige the owner, if he does not mean to produce the lessor's title, to say so, on entering into the treaty. *Ibid.*

9. Objection on the ground of non-production of Lessor's title, overruled, in the case of a Bishop's lease. *Fane v. Spencer.*

430 n.

10. See ALIEN.

11. On a reference of title, the Master having reported that a good title could be made, Order, referring it back to the Master to see whether such title could have been made prior to the filing of the Bill by the Vendor for a specific performance.

Birch v. Haynes.

444

12. Affidavits admitted, after answer, to be read in support of a motion to pay purchase-money into Court. Defendant being in possession, and having exercised acts of ownership, payment of the money ordered, al-

though an infant heir was a necessary party to the conveyance. *Bradshaw v. Bradshaw*. Page 492

13. Purchaser, a trustee, acting on behalf of himself and others his co-trustees, and of the *Cestui que trust*, ordered to pay purchase-money into Court; the agreement having been entered into in the name of himself alone; upon affidavits, that the Plaintiffs (the vendors) had no notice of his acting for others, and of acts of ownership committed since possession given to him under the agreement, in opposition to the answer, alleging notice, and denying any acts of ownership, by himself, or by any other person to his knowledge. *Crutchley v. Jerningham*.

W

WASTE.

1. See VENDOR AND PURCHASER, 2.
2. Injunction against permissivewaste. *Caldwall v. Baylis*. 408

WEST INDIES.

1. The statute of Mortmain does not extend to the island of *Grenada*, in the *West Indies*; the object of the statute being wholly political; it having grown out of local circumstances, and being intended to have only a local operation. *Attorney-General v. Stewart*. 143
2. Donations *inter vivos* in Mortmain are not prohibited by the statute, but regulated; the statute requiring enrolment in the Court of Chan-

cery; by which is meant the Court of Chancery, in *England*, where there is an ancient office for the enrolment of deeds; and there being no enrolment offices annexed to the Courts of Chancery in the colonies. *Ibid*.

3. Regularly, all questions of title to land in the colonies are to be decided, in the first instance, by Courts of local judicature, from which an appeal lies to the King in Council. *Ibid*.

WILL.

1. Testator gives to A. £10,000, together with the furniture in his houses, (plate only excepted,) and appoints him executor. Although the legacy constitutes a violent presumption in Law that the Testator meant to exclude him from the beneficial interest in the residue, the exception out of the bequest of furniture is not a circumstance to confirm that presumption, so as to preclude him from giving parol evidence of intention in his favour; such evidence being also liable to be repelled by evidence of a contrary intention.

The evidence not amounting to a direct intention in the executor's favour, and being met by contrary evidence tending to confirm the legal presumption against him, he was declared by the Master of the Rolls to be a trustee of the residue for the next of kin, and the decree at the Rolls was now, upon appeal, affirmed.

N.B. In this case, it was con-

tended that to rebut the presumption of law, it is enough to show evidence of an intention to exclude the next of kin, without any evidence of direct intention in favour of the executor; but the Lord Chancellor's judgment seems to have left that point undecided.

Langham v. Sanford. Page 6

2. If, on the face of the will, there is not an apparent intention to exclude the executor, parol evidence of such intention is not admissible. *Ibid.* 17

3. Where a Testator gives a legacy to *A.* by will, and afterwards, by codicil, appoints him his executor, *quære*, if the violent presumption to exclude him from the surplus arises.

But where the appointment follows the gift of the legacy, though at any interval in the same instrument, the rule does apply, because the whole instrument must be construed to have effect at once from the moment of signature. *Ibid.* 21

4. In the construction of a will, it is to be presumed that the Testator was acquainted with the Rules of Law. *Ibid.* 22

5. Where parol evidence is let in to explain a will, the first evidence is that of declarations made at the time of executing it. The evidence of declarations made before and after is entitled to little attention in comparison. *Ibid.* 23

6. To authorise the rejection of words in a will, there must be an absolute impossibility of construing the will, those words being retained. The mere improbability that a Testator

could have meant what he has expressed; neither amounts to a cause for rejection, nor renders the devise void for uncertainty. *Chambers v. Brailford.* Page 25

7. Testator, after making a provision for the maintenance of his children, gives "all the rest, residue, and remainder of his real and personal estate," to his son *T. W. G.*, "to be a vested interest on his attaining the age of 21;" and, "if he shall happen to die before 21," then to his daughter *E. G.* with remainders over. The rents and profits are to accumulate until *T. W. G.* attains 21, or dies under that age. *Glanvill v. Glanvill.* 38
8. Testator by Will charges all his estates with payment of debts, and makes his son residuary legatee; afterwards purchases copyholds which are duly surrendered to the use of his will, and by codicil devises those copyholds to his son in fee.

The codicil held a republication of the will so as to subject those copyholds to the payment of debts. *Rowley v. Eyton.* 128

9. Devise to *A.* and *B.* "between them." These words constitute a tenancy in common. *Lashbrook v. Cock.* 70

10. Gift of real and personal estate, to trustees, upon trust to apply the rents and dividends, (or so much as they should think fit,) to the maintenance, &c. of *W. R. R.* until twenty-five; then to permit him to receive the same during his life; and after his death to apply the

same (or so much, &c.) to the maintenance, &c. of all and every the children of *W. R. R.* until twenty-five respectively; then upon trust to assign and transfer to such children so attaining twenty-five, "and in case *W. R. R.* shall die without leaving issue living at the time of his death, or leaving such, and all die before twenty-five," upon trust to pay, &c. unto and among all and every the brothers and sisters of *W. R. R.* share and share alike, upon their attainment of twenty-five, or marriage respectively; followed by a gift of residue, upon trust, as to one moiety, to permit the testator's daughter *A.*, and her husband, to receive the rents, &c. during their lives in succession, and, after the death of the survivor, to the children (except *W. R. R.*) in the same manner as with respect to the former gift. And, as to the other moiety, upon like trusts for the testator's daughter *B.*, her husband and family; with survivorship between the respective grandchildren; and, in case of the death of either of the daughters without leaving issue living at her decease, then to the children of the surviving daughter.

Held, that the limitation to the brothers and sisters of *W. R. R.* in default of issue living to attain twenty-five, was intended to include *all* his brothers and sisters living at his death, and was consequently void for remoteness.

Held, vested interest at twenty-five in every instance notwithstanding

different expressions, there being no antecedent gift, of which it could have been the testator's intention merely to postpone the enjoyment; the gift being only the direction to pay at twenty-five.

A. having died, leaving issue, the moiety of the residue intended for her children, held undisposed of, as being void for remoteness. The other moiety held to vest in contingency during the life of *B.*; and, if she should die without issue, to be well given over to the children of *A.* *Leake v. Robinson.* Page 363

11. Gift to *A.* for life, remainder to his children. This includes all children, both those born before, and those born after, the testator's death; the rule of exclusion being an artificial rule of construction. *Ibid.* 382
12. The Court inclines to construe a residuary clause so as to prevent intestacy. *Ibid.* 386
13. Gift of all the interest is a ground for presuming an intention to vest the capital. *Secus*, where there is only a direction for maintenance out of the interest. *Ibid.*
14. *See* VESTING, 3.
15. A testator having attempted to give to *all* his grand-children, and also to postpone the period of vesting till twenty-five, which are two objects legally inconsistent, the Court cannot choose between these inconsistent objects, so as to give effect to the one and disappoint the other. *Ibid.* 388
16. *See* LEGACY, 9.
17. With regard to personal estate whatever is not well given by the

will falls into the residue. It is immaterial how it happens that any part is undisposed of, whether by the death of a legatee, or by the remoteness, and consequent illegality, of the bequest. *Leake v. Robinson.* Page 392

18. The limitations of a particular bequest, and of the residue, may be incongruous; but whatever turns out to be undisposed of, is not the less residue. *Ibid.* 393
19. See BASTARD, 1, 2.
20. MARRIAGE SETTLEMENT, 4.
21. POWER.

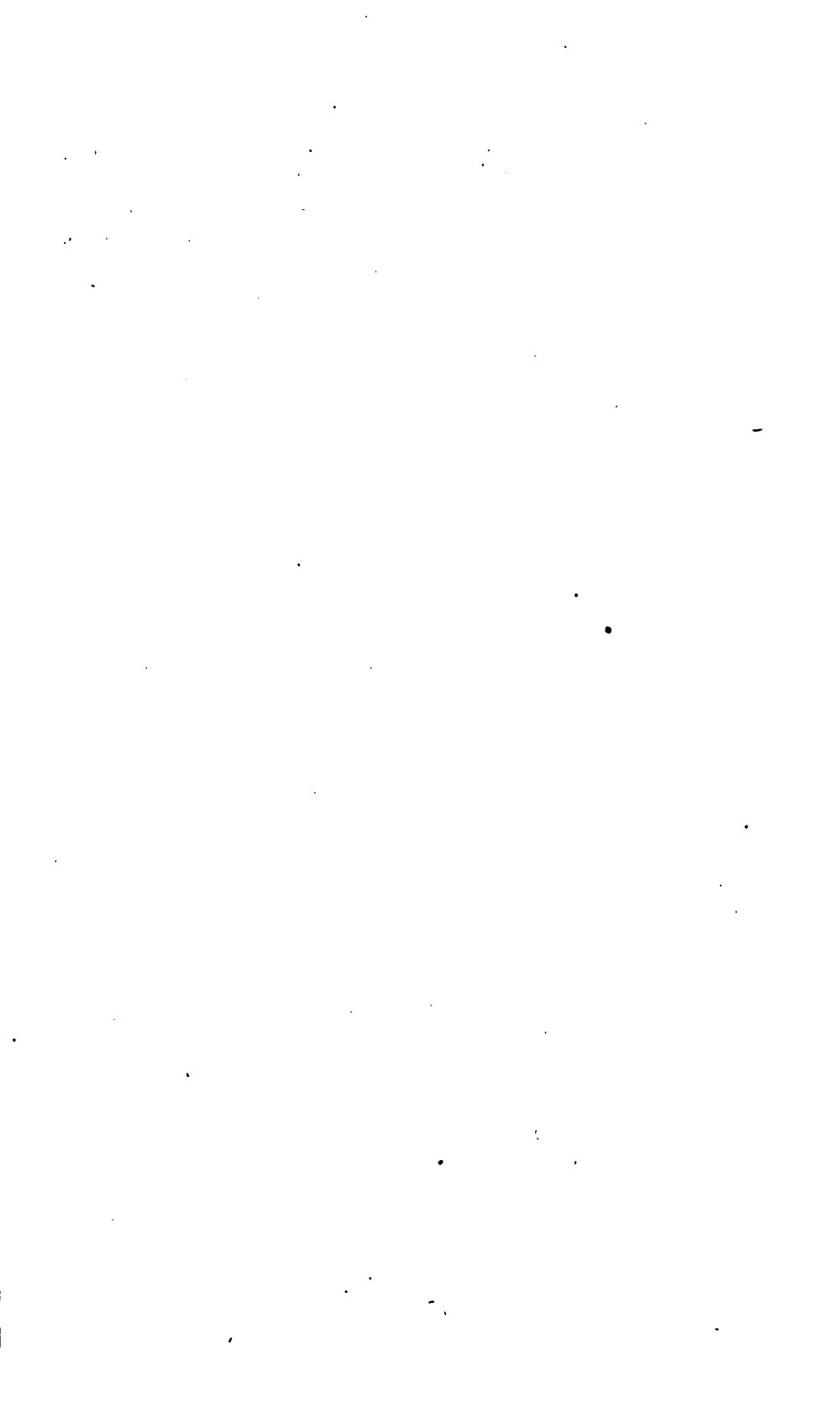
WORDS.

1. See WILL, 6.
2. ———, 9.
3. DEED, (CONSTRUCTION OF), 6.

WRIT.

1. DE RATIONABILIBUS DIVISIS.
Speer v. Cawter. Page 416
2. DE PERAMBULATIONE FACIENDA.
Ibid.

END OF VOL. II.



CHANGES
AND
PROMOTIONS,
ON THE BENCH AND AT THE BAR.

THIS day, His Honour, *The MASTER of the* ROLLS, sat at three o'clock, to hear the few remaining petitions which stood over from the preceding evening, and to deliver his judgment in the case of *Scott v. Porcher* (a), (the only cause which had been heard before him, and was then undecided); after which Sir *Arthur Piggott* rose, and, in the name of the Bar, addressed His Honour as follows :

ROLLS.
Dec. 23. 1817.

“ Upon your retirement, Sir, from that seat of justice in which for more than sixteen years you have presided, the Gentlemen of the Bar, attending this Court, are desirous of expressing the sentiments with which they are impressed on an occasion of great regret and concern to them ; and on which they wish to offer an unfeigned tribute of that respect which you have so abundantly merited, and to which you are so justly entitled.

“ The promptitude and wisdom of your decisions have been as highly conducive to the

(a) To be reported in the third Volume of this Work.

benefit of the suitor as they have been eminently promotive of the general administration of Equity. In the performance of your important and arduous duties, you have exhibited an uninterrupted equanimity, and displayed a temper never disturbed, and a patience never wearied : you have evinced an uniform and impartial attention to those engaged in the discharge of their professional duties here, and who have had the opportunity, and enjoyed the advantage, of observing that conduct in the dispensation of justice, which has been conspicuously calculated to excite emulation, and to form an illustrious example for imitation.

“ Accept, Sir, the cordial and sincere wishes of those whom you leave devoted to the labours of this place, that, with the gratifying reflections which will be the inestimable reward of so considerable a portion of your life so meritoriously and exemplarily employed, you may enjoy health and happiness in repose, on your secession from business and labour, from the toils and anxieties of a painful judicial station, to the importance and eminence of which you have, in so great a degree, and in so distinguished a manner, contributed, and on which you have cast additional lustre.”

To which His Honour replied :

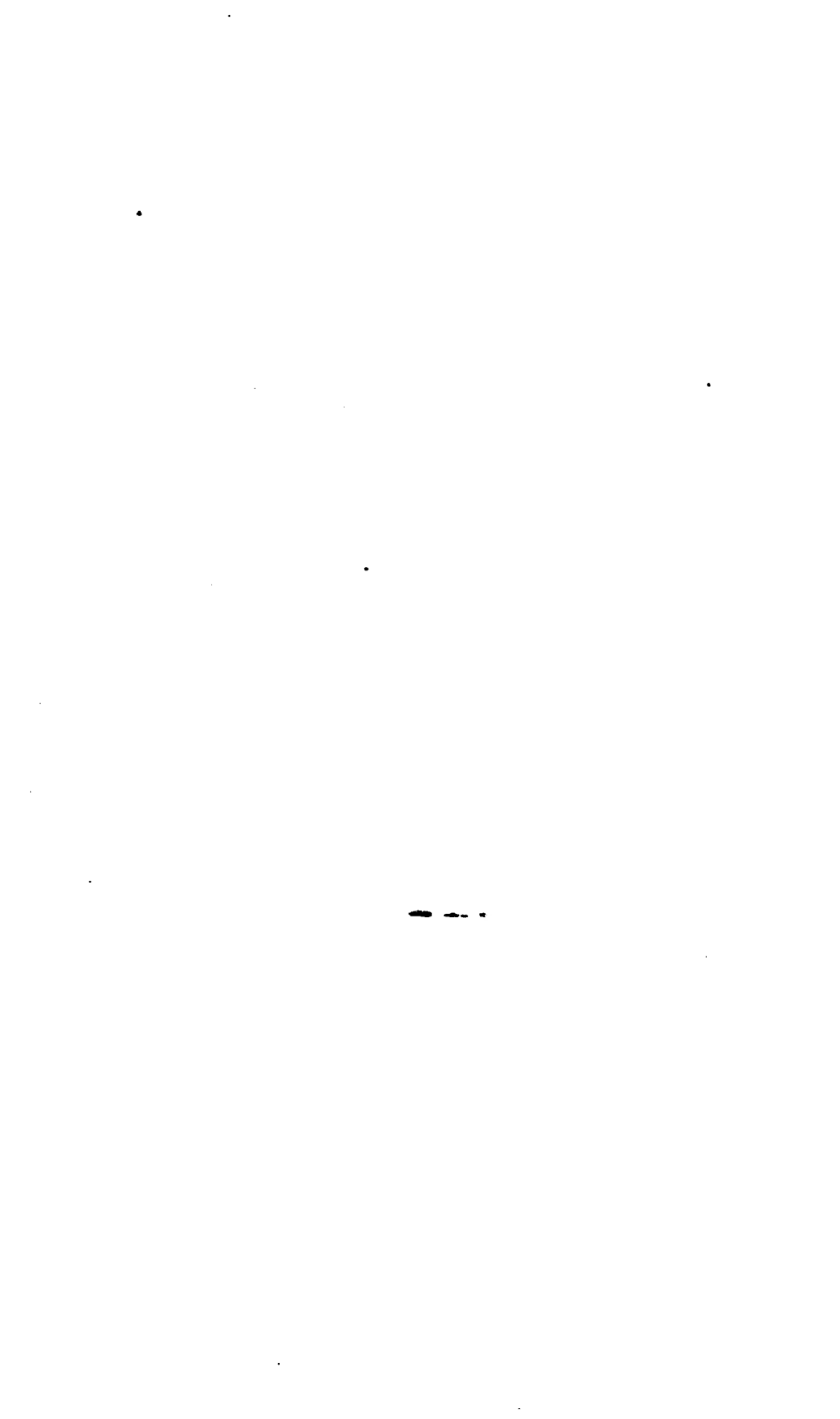
“ It is impossible that I should not be highly gratified by the favourable opinion which the Gentlemen of the Bar have been pleased to ex-

press of my conduct in the situation from which I am about to retire. For this, and every other mark of their regard, I thank them most sincerely. The kindness, the attention, the respect which I have uniformly experienced from them, will never be obliterated from my memory. My conduct towards them has been only that to which their own merit justly entitled them. I have always found them alike distinguished for their learning and knowledge in their profession, and for the honour and liberality which they have carried into the practice of it. The approbation of such men is truly valuable. I receive it with pleasure — I shall remember it with gratitude.

“Gentlemen, farewell! My best wishes will ever attend you.”

At the first Seal before *Hilary Term*, 1818, Sir JOHN LEACH took his seat on the bench as *Vice-Chancellor*, in the place of Sir THOMAS PLUMER, who succeeded Sir WILLIAM GRANT as *Master of the Rolls*.





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